THE FEDERAL COURT ACT

a study of the court's administrative law jurisdiction

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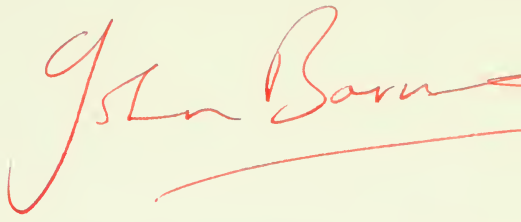

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ADMINISTRATIVE LAW JURISDICTION

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Prepared for the
Law Reform Commission of Canada

by

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Table of Contents

Foreword

In accordance with its Research Program, the Commission has for some time now been engaged in studying "the broader problems associated with procedures before administrative tribunals". Among the obvious matters requiring examination in fulfilling this mandate is the relationship of the courts to these tribunals.

Since 1971, the Federal Court has (with the exception of provincial superior court's jurisdiction by way of *habeas corpus*) been given exclusive powers of judicial review of federal administrative authorities. As this Background Paper demonstrates, the Court appears in general to have performed this role expeditiously and well. However, numerous problems respecting its jurisdiction have given rise to increasing demands for amendments to its constituent statute. Under these circumstances, the Commission in 1971 decided to have this in-depth study undertaken to assist in illuminating the debate.

Early in 1977, it was decided that the Commission itself should prepare a Working Paper to put the issues in greater focus still. That paper, the *Federal Court*, has already been published. Its conclusions and those in this Background Paper are quite similar, but there are differences in emphasis and in proposed techniques for solving various problems. The Commission will carefully study comments on both this Background Paper and the Working Paper in charting its future course in this area. It, therefore, invites the views of the legal profession and of the public generally.

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I. Introduction

On June 1, 1971, the Federal Court of Canada came into existence.[1] In many respects, this new court simply took over the jurisdiction of the former Exchequer Court of Canada[2] but there was also a significant difference between the jurisdictions of the two courts. The new Federal Court was given judicial review jurisdiction over basically all federal statutory authorities and, moreover, this jurisdiction was, in virtually all respects, an exclusive jurisdiction, replacing a function which, up until then, had been performed by the various provincial superior courts.[3] In contrast, the Exchequer Court as a statutory court had no inherent judicial review jurisdiction[4] and was not specifically given any by its empowering statute. Its only administrative law jurisdiction came through the various statutory appeal provisions by which those affected could appeal the decisions of certain administrative authorities to the Exchequer Court.[5] This jurisdiction was also taken over by the new Federal Court and, indeed, strengthened, in that some appeals from administrative authorities which had formerly gone to the Supreme Court of Canada now were reposed in the Federal Court.[6]

The rationale for the conferral of judicial review jurisdiction on the Federal Court was basically simple. It was felt to be more appropriate that there be a federal court exercising that kind of authority than that such matters continue to be dealt with by the various provincial superior courts across the country.[7] The availability of judicial review from each provincial superior court raised the possibility of conflicts in jurisdiction in particular matters. Moreover, review by separate superior courts guaranteed neither consistency in the law being applied to particular federal administrative authorities nor sufficient expertise in the working of those authorities, particularly given its random nature.[8] Presumably, there was also some feeling that, with a federal court already exercising some supervisory powers over certain federal authorities in the form of statutory appeals, a consolidation of all such supervisory powers, whether by way of appeal or review, had a certain compelling logic.

At the time, there did not seem to be too much controversy generated by the basic policy objective.[9] The literature surrounding the preparation and the enactment of the *Federal Court Act* simply does not reveal any great provincial objection to this transfer of jurisdiction from the provincial superior courts to a federal court; nor did this aspect seem to trouble even the academics.

There were, however, considerable reservations expressed about the way in which the jurisdiction was established.[10] First, there were some doubts as to whether the conferral of what purported to be almost exclusive judicial review jurisdiction on the Federal Court was constitutional.[11] Secondly, and this seemed to be the major concern, it was thought that the way in which the original jurisdiction of the court in judicial review matters was divided between the Trial Division and the Court of Appeal was extremely confusing and bound to be productive of much litigation.[12] Interestingly, those responsible for the Act did not seem to contemplate much, if any, judicial review jurisdiction for the Trial Division. They saw section 18, the provision conferring jurisdiction on the Trial Division, as simply a device to transfer judicial review jurisdiction to the Federal Court, with section 28 then coming along to take that jurisdiction from the Trial Division, placing it in the hands of the Federal Court of Appeal.[12a]

Among other points of critical comment were the retention of the old forms of remedy (the prerogative writs and actions for declaration and injunction) in proceedings before the Trial Division (though there was also satisfaction that a new and simplified remedy had been devised for the original judicial review jurisdiction of the Court of Appeal),[13] and, the seeming extension of the historical grounds for judicial review in section 28 of the Act, the section conferring original judicial review jurisdiction on the Court of Appeal. It was felt, for example, by the Canadian Labour Congress, that this purported increase in the scope of judicial review would lead to far too much interference by an inexpert court in the affairs of expert administrative tribunals.[14]

It is now almost six years since the *Federal Court Act* came into force, six years during which the amount of court scrutiny of federal statutory authorities appears to have increased phenomenally — through both judicial review and statutory appeal. There has as a result been ample opportunity for the court to work with the judicial review provisions of the *Federal Court Act* and for an informed assessment of those provisions. Have they provided an adequate framework for the development of a coherent body of substantive law

of judicial review of administrative action? Of course, any new statute will have certain teething difficulties and one cannot be too critical of the fact that, from time to time, litigation ensues on issues of interpretation as to the scope of authority conferred. However, where those difficulties are constant the situation is quite obviously of more serious dimensions. Whether that is so in relation to the *Federal Court Act* will be the major concern of this paper.

II. Structure of Paper and Statement of Objectives

The basic structure of the paper is as follows: first, an outline of the statutory framework of the court's judicial review powers; secondly, a detailed examination of the difficulties the court has so far encountered with this judicial review jurisdiction and, thirdly and finally, comments on those difficulties with recommendations for change including various alternatives for restructuring the jurisdiction.

Of particular concern will be the matters which troubled commentators at the time of the enactment of the *Federal Court Act*. Has the division of jurisdiction between the Trial Division and the Court of Appeal worked satisfactorily or have the predictions of great difficulty with the language of the Act in setting up that division been vindicated? Have the extended grounds of judicial review established for the Court of Appeal by section 28 caused a significant increase in the scope of judicial review? How significant has the Trial Division's original jurisdiction in judicial review matters been in comparison to that of the Court of Appeal? Has the relationship established by the Act between judicial review and statutory appeal proved to be adequate? How has the Trial Division coped with a jurisdiction based on the old modes of judicial review, particularly in comparison with the new remedy created for the Court of Appeal's original jurisdiction? As well, there have been difficulties of interpretation which were not clearly foreseen in 1971 and these will be canvassed, *e.g.*, what is the meaning of the term "federal board, commission or other tribunal"?

Some mention will also be made of some of the perennial problems of judicial review of administrative action and how they have been dealt with by the Federal Court, *e.g.*, questions of *locus standi* and the application of the rules of natural justice. For the most part, however, any attempt at reviewing the work of the Federal Court in the substantive areas of judicial review will be avoided. This is clearly a most important topic but it was felt better to concentrate first on the obvious remedial problems. Also considered beyond the

scope of this paper are a number of aspects of remedial law including the role of the Attorney General in judicial review litigation, the question of the amenability of the Crown in right of Canada to the jurisdiction of the Federal Court and the whole question of damages for unlawful administrative action. Here too it was felt that these were matters worthy of further consideration and possibly separate studies. Finally, the paper only considers in passing the procedural rules which govern the availability of relief under the Act.

III. Statutory Framework of Court's Administrative Law Jurisdiction

A. FEDERAL BOARD, COMMISSION OR OTHER TRIBUNAL

By virtue of sections 18 and 28 of the *Federal Court Act*, original judicial review jurisdiction is divided between the Trial Division and the Court of Appeal. However, basic to this original jurisdiction is the requirement that a "federal board, commission or other tribunal" must be involved. On its face, this suggests that only administrative agencies are covered. However, the definition section of the statute defines the term so widely as to make all federal statutory decision-makers, save section 96 judges acting as such, potentially amenable to Federal Court review jurisdiction. Section 2(*g*) reads as follows:

> **2.** In this Act,
>
> (*g*) "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of *The British North America Act, 1867*;

B. ORIGINAL JURISDICTION OF THE TRIAL DIVISION

The original jurisdiction of the Trial Division in judicial review matters is contained in section 18. It reads:

18. The Trial Division has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Key features here are:

(a) the use of the word "exclusive", indicating an intention to exclude the review jurisdiction of the provincial superior courts;

(b) the retention of the traditional forms of judicial review remedies as the methods of providing judicial review;

(c) omission of the remedy of *habeas corpus* from the list of those available from the Trial Division, leaving open the possibility of obtaining this remedy from provincial superior courts in situations where a federal authority has the ability to keep persons in custody;[15]

(d) the rather peculiar provisions of subsection (*b*) presumably intended to make it clear that section 18 is available in situations where it is necessary to name the Attorney General as defendant rather than the statutory authority itself, *e.g.*, where a declaration is being sought against a non-suable entity.[16]

C. ORIGINAL JURISDICTION OF THE COURT OF APPEAL

On its face, section 18 would seem to clothe the Trial Division with total exclusive judicial review jurisdiction over federal statutory authorities, the sole exception being the continued *habeas corpus* jurisdiction of the provincial superior courts. However, section 28(3) makes it clear that this is not the case. The judicial review jurisdiction, conferred initially on the Trial Division, is restricted dramatically by section 28. If the Court of Appeal has jurisdiction under section 28, then according to section 28(3), the Trial Division is excluded.

Section 28 provides as follows:

28. (1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal

(*a*) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
(*b*) erred in law in making its decision or order, whether or not the error appears on the face of the record; or
(*c*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

(2) Any such application may be made by the Attorney General of Canada or any party directly affected by the decision or order by filing a notice of the application in the Court within ten days of the time the decision or order was first communicated to the office of the Deputy Attorney General of Canada or to that party by the board, commission or other tribunal, or within such further time as the Court of Appeal or a judge thereof may, either before or after the expiry of those ten days, fix or allow.

(3) Where the Court of Appeal has jurisdiction under this section to hear and determine an application to review and set aside a decision or order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order.

(4) A federal board, commission or other tribunal to which subsection (1) applies may at any stage of its proceedings refer any question or issue of law, or jurisdiction or of practice and procedure to the Court of Appeal for hearing and determination.

(5) An application or reference to the Court of Appeal made under this section shall be heard and determined without delay and in a summary way.

(6) Notwithstanding subsection (1), no proceeding shall be taken thereunder in respect of a decision or order of the Governor in Council, the Treasury Board, a superior court or the Pension Appeals Board or in respect of a proceeding for a service offence under the *National Defence Act*.

Of significance, besides subsection (3), are

(a) the fact that section 28(1) applies "[n]otwithstanding. . .the provisions of any other Act", seemingly an attempt to overcome the effect of privative clauses or provisions restricting the scope of common law judicial review in other empowering statutes.[16a]

(b) the type of remedy available from the Court of Appeal — "an application to review and set aside".

(c) the restriction of section 28(1)'s application to "decision[s]" or "order[s]", this raising questions as to what constitutes a "decision or order" and opening up the possibility of Trial Division review of everything that is not a "decision or order", and, also of review, particularly by way of prohibition, injunction and declaration, before a "decision or order" has been taken or made by a federal statutory authority.

(d) the extension of the Court of Appeal's jurisdiction to all decisions or orders "*other* than [those] of an administrative nature not required by law to be made on a judicial or quasi-judicial basis", this, of course, raising the question of what kinds of decision actually fit into the excluded class.

(e) The codification of the grounds of judicial review, including the well-known common law grounds involving natural justice and jurisdiction in (a) and the seeming extensions of the common law grounds in (b) and (c). At common law, of course, it is generally considered that review for error of law is confined to those errors of law that *do* appear on the face of the record of a tribunal obliged to act in a judicial or a quasi-judicial manner[17]. Subsection (*c*) finds no common law analogue unless it be the debated ability of a court to review a decision which is not supported by "any" evidence.[18]

(f) the restriction of the time for applying for section 28 relief to ten days from the communication of the decision or order unless an extension is granted by the Court (*cf.* section 18 where no time limits are imposed).[19]

(g) the standing given to the Attorney General of Canada and to "any party directly affected" — a narrowing of the common law standing rules for seeking judicial review?

(h) the ability of a board, commission or other tribunal to, in effect, state a case to the Court of Appeal (subsection 4).

(i) the direction for a speedy, resolution of issues in subsection 5.

(j) the non-availability of the section 28 route in relation to those decision-makers specified in subsection 6, this once again opening up the possibility of Trial Division jurisdiction *e.g.* declarations of invalidity of Orders-in-Council. (In this regard, attention should also be paid to section 17(5) which

gives the Trial Division exclusive original jurisdiction to issue prerogative writs (excluding *quo warranto* but including *habeas corpus*) in relation to members of the armed forces serving outside Canada. *Quaere* whether this is, in any way, affected by section 28(3).)

D. THE EFFECT OF STATUTORY RIGHTS OF APPEAL

The impression given by sections 18 and 28 is that the review jurisdiction of the Federal Court is divided as between its two divisions but with all federal statutory decision-makers at least subject to review jurisdiction in one of the divisions. However, there is the possibility that there may be no review jurisdiction in relation to certain decision-makers. This emerges from section 29 which applies, notwithstanding sections 18 and 28:

> . . .[W]here provision is expressly made by an Act of the Parliament of Canada for an appeal as such to the Court, to the Supreme Court, to the Governor in Council or to the Treasury Board from a decision or order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except to the extent and in the manner provided for in that Act.

Noteworthy, however, is the fact that section 29 only takes away the right to seek judicial review to *the extent* that there is a right of appeal. This leaves open the possibility that there may be a judicial review application with respect to allegations or grounds that are not covered by the statutory right of appeal.[19a]

E. THE FEDERAL COURT AS A COURT OF APPEAL FROM FEDERAL STATUTORY AUTHORITIES

As far as the appellate jurisdiction of the court is concerned, the following provisions merit attention:

(i) Sections 64, 65 and Schedule B of the Act which have the effect of transferring appellate jurisdiction with respect to federal statutory authorities from the Exchequer Court and Supreme Court of Canada to the Federal Court.

(ii) Section 21 which gives the Trial Division exclusive, original jurisdiction to hear appeals under the *Canadian Citizenship Act*, which were previously taken to the Citizenship Appeal Court.

(iii) Section 30 which provides:

> **30.** (1) The Court of Appeal has exclusive original jurisdiction to hear and determine all appeals that, under any Act of the Parliament of Canada except the *Income Tax Act*, the *Estate Tax Act* and the *Canadian Citizenship Act*, may be taken to the Federal Court.

This is reinforced by section 24 which provides that the Trial Division deals with *Income Tax Act* and *Estate Tax Act* appeals unless the Rules otherwise provide.

> (2) Notwithstanding subsection (1), the Rules may transfer original jurisdiction to hear and determine a particular class of appeal from the Court of Appeal to the Trial Division.

F. TYPES OF RELIEF AVAILABLE FROM THE COURT

There is no specific provision as to the power of the Trial Division under section 18 and, fairly obviously, what it may do under that section is governed by the powers available by virtue of the old remedies named therein. However, the powers of the Court of Appeal, both as an appeal and a review body, are set out in section 52. Of particular note are the differences between subsections (*c*) and (*d*). Under (*c*), the statutory appeal provision, the court may substitute its decision for that of the body appealed from while the most that the court can do, under (*d*), the judicial review provision, is to set aside a decision or order and refer the matter back to the tribunal with directions as to determination. In many cases, this will not have practical significance but it confirms at least the traditional differences between statutory appeal authority and common law judicial review powers.

> **52.** The Court of Appeal may
>
> (*a*) quash proceedings in cases brought before it in which it has no jurisdiction or whenever such proceedings are not taken in good faith;

(*b*) in the case of an appeal from the Trial Division,

(i) dismiss the appeal or give the judgment and award the process or other proceedings that the Trial Division should have given or awarded.

(ii) in its discretion, order a new trial, if the ends of justice seem to require it, or

(iii) make a declaration as to the conclusions that the Trial Division should have reached on the issues decided by it and refer the matter back for a continuance of the trial on the issues that remain to be determined in the light of such declaration.

(*c*) in the case of an appeal other than an appeal from the Trial Division,

(i) dismiss the appeal or give the decision that should have been given, or

(ii) in its discretion, refer the matter back for determination in accordance with such directions as it considers to be appropriate; and

(*d*) in the case of an application to review and set aside a decision of a federal board, commission or other tribunal, either dismiss the application, set aside the decision, or set aside the decision and refer the matter back to the board, commission or other tribunal for determination in accordance with such directions as it considers to be appropriate.

Appeals from decisions of the Trial Division in section 18 matters and in statutory appeals are governed by section 27(1) and are as of right. There is then, by virtue of section 31,[20] a possibility of a further appeal to the Supreme Court of Canada either by leave of the Court of Appeal (subsection 2) if the Court of Appeal is of the opinion that "the question involved. . .is one that ought to be submitted to the Supreme Court for decision" or by leave of the Supreme Court of Canada (subsection 3) where

> . . .the Supreme Court of Canada is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in such question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from such judgment or determination is accordingly granted by the Supreme Court.

By way of contrast, in matters coming before the Court of Appeal under section 28 or by way of statutory appeal, there is no automatic right of appeal, the only possibility being an appeal to the Supreme Court of Canada under section 31.

Against the background of the statutory framework, some of the areas of difficulty that have been encountered in the Federal Court's administrative law jurisdiction, using that term in the broad sense of both statutory appeal and judicial review jurisdiction, will now be considered.

IV. The Act in Operation

A. CONSTITUTIONALITY

As already noted, some commentators in 1970-71 were sceptical about the constitutional validity of the attempt made in the *Federal Court Act* to deprive the provincial superior courts of their common law or inherent judicial review jurisdiction over federal statutory decision-makers.[21] And, indeed, *dicta* could be found supporting the proposition that this jurisdiction was not subject to removal by the Parliament of Canada.[22]

Since 1971, the question has never been litigated directly. However, the weight of opinion now firmly supports the power of the Parliament of Canada to remove the judicial review jurisdiction of the provincial superior courts over federal statutory decision-makers[23] by virtue of section 101 of the *British North America Act* which provides for the establishment by Parliament of "additional Courts for the better administration of the laws of Canada". This expression "additional courts" is not only seen as meaning courts in addition to the Supreme Court of Canada rather than in addition to provincial superior courts, but also as authorizing the exclusion of provincial superior court jurisdiction in matters of federal competence.[24]

Support for this proposition can also be found in the decision of the Supreme Court of Canada in *Pringle and Department of Manpower and Immigration v. Fraser*,[25] which held effective a privative clause completely excluding provincial superior court jurisdiction in matters coming within the powers of the Immigration

Appeal Board.[26] In delivering the judgment of the Court, Laskin J. (as he then was) stated:

> Parliament's authority to establish such a code is not challenged; nor is Parliament's authority to deny or remove *certiorari* jurisdiction from provincial superior courts over deportation orders.[27]

If this is admitted, then section 101 would seem clearly to provide the justification for the establishment of an alternative court once the provincial superior court's judicial review jurisdiction has been validly removed.

While the basic proposition does not appear to be subject to much controversy, there is at least one problem. What is the position where the constitutional validity of the powers being exercised by a federal statutory decision-maker are being challenged?

This issue has been dealt with recently by Professor Dale Gibson.[28] Professor Gibson is most critical[29] of the decision of Donnelly J. of the Ontario High Court in *Denison Mines Ltd. v. Attorney General of Canada*,[30] where it was held that, by virtue of section 17(1), the Federal Court alone had jurisdiction to deal with an action for a declaration that the federal *Atomic Energy Act* was unconstitutional. He also notes[31] the decision of the Ontario Court of Appeal in *City of Hamilton v. Hamilton Harbour Commissioners*[32] where it was held (without the constitutional argument being raised)[33] that, by virtue of section 18, only the Federal Court had jurisdiction to hear an action for a declaration that the City of Hamilton had land-use planning jurisdiction over land owned by a federal commission — an action which turned on a constitutional argument.

As Professor Gibson points out, a literal reading of sections 17 and 18 would indeed leave provincial superior courts without jurisdiction in these matters.[34] However, he argues that, in so far as constitutional issues are involved, the jurisdiction of the Federal Court is at most concurrent. His first argument is basically that

> [t]he constitution has been found to contain an implied prohibition against preventing the adjudication of constitutional challenges, and it would be a relatively short further step to hold that it also prohibits all other substantial limitations on the right to make such challenges.[35]

Secondly, and more strongly, he contends that an argument can be made for protecting the jurisdiction of the provincial superior courts at least in cases involving the constitutionality of powers exercised by federal statutory decision-makers, under section 92(14) of the *B.N.A. Act* ("The Administration of Justice in the Province").[36]

Professor Gibson's views are supported by Professor P. W. Hogg[37] and, as Professor Gibson points out,[38] are also not unnaturally shared by some of the provinces. However, with one exception, there is as yet no direct judicial support for this particular argument. The one exception is the decision of Osler J. at first instance in *Bedard v. Isaac*[39] and related not to a "distribution of authority" constitutional argument but to a situation involving an argument that a federal statute was inoperative as being contrary to the *Canadian Bill of Rights*. After noting that he did not think that section 18 was clearly enough worded to remove provincial superior court review jurisdiction anyway, though without identifying where the lack of clarity lay, Osler J. continued:

> Put succinctly, no action of such a person can be protected from review by this Court if such action purports to be justified only by a federal statute which is upon a true construction inoperative by virtue of the provisions of the *Canadian Bill of Rights*.[40]

If accepted by other courts, this argument will presumably have the effect of giving concurrent jurisdiction to the Federal Court and the provincial superior courts where constitutional issues of this kind are involved. It is doubtful that the Supreme Court of Canada would feel impelled to strike down the whole of section 18 because of the unconstitutional aspect or simply to sever the word "exclusive", thus making the jurisdiction concurrent in all matters covered by section 18. The probability, at most, is that it would interpret section 18 as not intended to remove the power of provincial courts to review on constitutional grounds. It is also worth adding that in a situation where a litigant wished to raise both constitutional and other judicial review grounds in the same proceedings with respect to a "federal board, commission or other tribunal" he would still presumably be forced to go to the Federal Court, given no provincial superior court authority over the other grounds for claiming relief.

B. FEDERAL BOARD, COMMISSION OR OTHER TRIBUNAL

The question of what constitutes a "federal board, commission or other tribunal" has been considered on at least thirty occasions by the Federal Court, the Supreme Court of Canada and various provincial courts since the *Federal Court Act* came into force on June 1, 1971.[41]

By dint of the definition in section 2(*g*), this term would seem capable of embracing literally all persons or bodies which are given power by virtue of a federal statute, unless they happen to be section 96 judges acting in that capacity. An obvious source of difficulty with the definition is raised by the possibility that section 96 judges might be given statutory authority in some other capacity and, indeed, much of the judicial discussion of section 2(*g*) has turned on this very question — Is this person acting as a section 96 judge or as *persona designata* under this particular provision? However, these have not been the only points of contention about the interpretation of section 2(*g*) and, as a preliminary proposition, it can be stated that the courts have shown some signs of unwillingness to attribute to section 2(*g*) its fullest possible meaning. Some of the limitations in section 2(*g*) will be discussed, after which the vexed question of when is a section 96 judge acting as *persona designata* will be examined.

1. Implied Limitations on Section 2(*g*)[42]

With a couple of notable exceptions,[43] the provincial courts have accepted the clear meaning of the definition of "federal board, commission, or other tribunal" in section 2(*g*) and have held that their jurisdiction is excluded over these bodies.[44] The Federal Court has also interpreted section 2(*g*) in its literal sense. For example, Heald J. of the Trial Division had no difficulty in holding that a Board of Review appointed by the Lieutenant Governor of New Brunswick under the *Criminal Code* was within the scope of the definition in that the source of its power was a federal statute, even though the appointing authority was provincial.[45] Moreover, as Lemieux and Vallières assert in a recent article, the same result would almost certainly occur if a provincially-established board were to be delegated authority under a federal statute.[46] Indeed, in the converse situation of a federal board being delegated authority under a provincial statute, the Quebec Court of Appeal has held that the Act does not apply.[47]

The position of the Crown is still somewhat unclear. Certainly there would seem to be no room for arguing that the Crown comes within the definition when acting under prerogative powers. But, what if the Crown is given authority under a federal statute (*e.g.* the power of the Governor in Council to make regulations)? As Lemieux and Vallières point out,[48] there are *dicta* by Thurlow J. in *Minister of*

National Revenue v. Creative Shoes to the effect that the Crown does not come within section 2(*g*),[49] though as they also point out the remedy being sought in that case was *certiorari*, a remedy that has never been seen as being available against the Crown.[50] However, in *Desjardins v. National Parole Board*,[51] it was held that the Governor in Council was not subject to judicial review under section 18 in that he was not encompassed by the section 2(*g*) definition of "federal board, commission or other tribunal" in making an Order in Council. However, the court held that in such matters the appropriate method of proceeding was to seek a declaration naming the Attorney General of Canada as defendant (this presumably being justified by section 18(*b*)).[52] Thus it begins to appear as though the Crown does not come within section 2(*g*), even when exercising statutory powers, but, as *Desjardins* makes clear, there may be more than one way to skin a cat. Lemieux and Vallières also note a couple of cases where the Crown was sued in proceedings for declaratory relief without the issue being raised.[53]

Also excluded from the definition of "federal board, commission or other tribunal" may be Crown Corporations such as the C.B.C, and indeed all directors and officers of corporate bodies which derive their power from federal statutes. This question was raised directly in the Ontario Court of Appeal in *Canada Metal Co. Ltd. v. C.B.C. (No. 2)*[54] and it was there held that the C.B.C was not a "federal board, commission or other tribunal". MacKinnon J.A., delivering the judgment of the court, compared the C.B.C. with the Hamilton Harbour Commissioners,[55] a body which previously had been held to come within the definition.

> The legislation governing the Hamilton Harbour Commissioners makes it clear that they have extensive powers to make administrative orders, such as licensing and regulating other people in the use of the harbour, as well as power to impose penalties upon persons infringing on their governing statute or their by-laws. This, in my view, is completely different from the C.B.C., a corporate entity carrying on the business of broadcasting in this country with none of the attributes of federal board, commission or tribunal.[56]

Indeed, in this case, the distinction adverted to is relatively easy to see, albeit that the C.B.C. derives its corporate existence and authority from a federal statute. Also, though this was not referred to in the *Canada Metal* case, there is support for this view in the *dicta* of Laskin C.J.'s dissenting judgment in *Attorney General of Canada v. Lavell*[57] where he talks about the inappropriateness of holding certain "private authorities" as included within the compass of section 2(*g*) and cites as an example, *inter alia*, boards of directors of corporations incorporated under the *Canada Corporations Act*.

The real difficulties come, however, in knowing how far this particular category of excluded authorities will be taken. In *Lavell*, Laskin C.J. gave these examples by way of analogy with Band Councils appointed under the *Indian Act*, which he also thought did not come within section 2(*g*).[58] However, even a cursory look at the powers conferred on a Band Council by section 81 of the *Indian Act* shows that this is quite a different type of body from the C.B.C. For example, such a Council is given authority to make rules binding on individuals.[59] If this is excluded, where does the list of exclusions stop? What, for example, is the position of the Central Mortgage and Housing Corporation which is given powers under the Income Tax Regulations to issue certain types of certificate?[60] Is it a "federal board, commission or other tribunal" when it is performing this function? Once it is found to have the powers of a "federal board, commission or other tribunal" with respect to one of its functions, is it thereby subject to Federal Court jurisdiction in all of its functions, whatever their nature? Certainly, the definition section as presently-worded admits of the clear possibility of an affirmative answer.

Further complications in determining the scope of section 2(*g*) have also been added by the decision of the Supreme Court of Canada in *Vardy v. Scott*.[61] Earlier, the Supreme Court had decided in *Commonwealth of Puerto Rico v. Hernandez*[62] that an Extradition Judge acting under the *Extradition Act*, even though he was a section 96 judge, acted under that statute as *persona designata* and, as a result, was subject to Federal Court jurisdiction. In *Vardy v. Scott*, the process in question was the taking of depositions under the *Extradition Act* by a Newfoundland magistrate or Justice of the Peace for use in an extradition hearing to be held in Florida. On the question of whether such a function came within the scope of the definition, Dickson J. speaking for the court[63] had this to say:

> A magistrate taking depositions under the *Extradition Act* performs a function different from that of an extradition judge. He performs a simple administrative task similar to his role when hearing evidence in a preliminary inquiry. In contrast, an extradition judge is involved in decision-making, performing a task integral to the comprehensive extradition scheme created by statute and treaty. Thus, there would appear to be more reason to regard an extradition judge as a *persona designata* and thus a "federal board" subject to Federal Court supervision. The magistrate, appointed under a law of a province and exercising only peripheral powers under the *Extradition Act*, analogous to his usual judicial duties, remains subject to the supervisory jurisdiction of provincial superior courts.[64]

Though one can see the functional reasons for this decision in the context of extradition, it also complicates the issue as to whether a

particular authority fits within the definition. Till *Vardy*, the *persona designata* appellation had only been used in contradistinction to a situation where a section 96 judge had been exercising functions as a judge under section 96. Here, the concept was applied to a person who was not a section 96 judge. Obviously, the nature of the task involved was the critical feature of the judgment in *Vardy* but how relevant this case is to other situations is not at all clear, though it does seem probable that it will have relevance only where the person in question is provincially-appointed. Perhaps, in the last analysis, the case is unique or, at least, highly unusual. Nevertheless, when read along with Laskin C.J.'s judgment in *Lavell*, this decision makes it clear that the Supreme Court of Canada sees considerable difficulties involved in determining whether a person or body is a "federal board, commission or other tribunal" in terms of section 2(*g*).

2. Section 96 Judges

For the most part, the Federal Court has been prepared to hold that where a section 96 judge has been given jurisdiction under a federal statute, other than one relating to the normal civil or criminal jurisdiction of such judges, that jurisdiction comes to him not as a section 96 judge but as *persona designata*.[65] Both Lemieux and Vallières[66] and, earlier, J. E. Côté[67] have been critical of the court's failure to articulate clearly the criteria for distinguishing between these two capacities of a section 96 judge. Indeed, this lack of specificity also emerges from the Supreme Court of Canada judgment in *Commonwealth of Puerto Rico v. Hernandez*,[68] though there perhaps the determination that the extradition judge acted as *persona designata* was made easier by the fact that persons other than section 96 judges could also exercise the same functions.[69]

The notable exception to the cases where the Federal Court has considered such judges to be acting as *personae designatae* when they derive their powers from special statutes is *Attorney General of Canada v. Morrow*.[70] There the Trial Division held that Morrow J. of the Northwest Territories Territorial Court was acting as a section 96 judge in dealing with a reference from the Registrar of Titles regarding the registrability of a *caveat* under the *Land Titles Act*. This certainly looks like the normal civil jurisdiction of a section 96 judge and the decision is not really subject to criticism. However, it does

demonstrate that despite the general propensity of the court, the *persona designata* classification cannot be relied upon completely.

Generally, Lemieux and Vallières support the results reached by the court as reflecting the intention of Parliament in enacting section 18.[71] However, they suggest that this should not apply where the criminal jurisdiction of the courts is involved.[72] What exactly is meant by criminal jurisdiction is not made clear. For example, would they include extradition issues? However, this suggestion does raise an interesting problem. As already noted, in *Lingley v. Hickman*,[73] a Board of Review appointed under the *Criminal Code* was held to be covered. In *Royal American Shows Inc. v. Minister of National Revenue*,[74] the use of search and seizure powers was held to be subject to the Act. *In re Shell Canada Ltd.*,[75] an Ontario High Court judge acting under the *Combines Investigation Act* was also held to be subject to the Act. Given the application of the Act in these criminal or quasi-criminal situations, is there any possibility that the Act would be held to apply to any functions of section 96 judges under the *Criminal Code* itself, for example, the power to authorize a wiretap under section 178.12, or would that be seen by the Federal Court as too great an incursion?

In summary, section 2(*g*) has been most productive of litigation. This can be conveniently divided into two categories — those cases involving section 96 judges and those involving implied limitations on the literal scope of section 2(*g*). In neither of those areas is the law finally settled and many difficult cases would seem to lie in the future.

C. ORIGINAL JURISDICTION OF THE COURT OF APPEAL UNDER SECTION 28(1) AND (4)

1. Section 28(1)

The Court of Appeal's original jurisdiction under section 28(1) depends basically on two requirements: first, that a "decision or order" is involved and, secondly, that the decision or order not be one that is "of an administrative nature not required by law to be made on a judicial or quasi-judicial basis". Both requirements have

been productive of much litigation — the first perhaps surprisingly, the second predictably.[76]

(i) "Decision or order"

At common law, one of the most troubled areas is the availability of judicial review, particularly by way of *certiorari* and prohibition, with respect to bodies that do not make decisions but merely report or recommend.[77] This kind of problem has carried over to the jurisdiction of the Trial Division and the Court of Appeal under the *Federal Court Act*. In the Trial Division it has become relevant with respect to the availability of remedies.[78] At the Court of Appeal level, the problem is whether or not such bodies have made "a decision or order". If not, then of course the Court of Appeal has no jurisdiction. This problem will be discussed briefly here and then will be returned to later when the remedies available from the Trial Division are discussed.

Of greater significance, at least numerically, have been the cases in which the Court of Appeal has had to consider whether an interlocutory ruling made during the course of proceedings comes within the definition of "decision or order" for the purposes of section 28. At first glance, the section would seem to cover such matters since it provides for review of "a decision or order....made by or in *the course of proceedings* (emphasis added)", this apparently indicating authority to review not only final decisions of a "federal board, commission or other tribunal" but also all interlocutory decisions taken during the course of the proceedings before these bodies, provided the other requirement of section 28(1) has been met.[79] However, the Federal Court of Appeal certainly has not read the section in that light.

(a) *Reporting and Recommendatory Bodies*

The Court of Appeal has tended to take the predominant approach in Canadian jurisprudence[80] — purely reporting and recommendatory bodies do not make decisions or orders and, therefore, are not subject to review under section 28(1). Thus, in *Lingley v. New Brunswick Board of Review*,[81] the Court of Appeal held that it had no jurisdiction to review or set aside a recommendation or a report made by the Board to the Lieutenant Governor of New Brunswick, the Board having been appointed under the *Criminal Code*[82] to report on the mental state of a person acquitted of a charge of murder on the ground of insanity and thereafter confined.

In such a case, there is nothing in the *Code* to bind the Lieutenant Governor to follow the Board's findings be they favourably or unfavourably disposed towards the individual concerned.[83] Nevertheless, particularly in a situation where the Board recommends against release, it is difficult to see the Lieutenant Governor acting against its advice. Given, therefore, that an unfavourable recommendation is in effect a decision against the person, a more functional analysis of the Board's functions in *Lingley* might have produced a different result.[84] However, this was not to be expected, given the weight of authority in this area.[85] Thus, the applicant in such cases is left to whatever relief may be available from the Trial Division.

(b) *Interlocutory Rulings*

In one of the earliest Court of Appeal judgments under the *Federal Court Act*, *National Indian Brotherhood v. Juneau (No. 2)*,[86] in 1971, Jackett C.J. raised the question of what exactly "decision or order" in section 28(1) encompassed. He there stated: "I do not pretend to have formulated any view as to what the words 'decision or order' mean in the context of section 28(1)".[87] Nevertheless, the opinions he expressed in that case have formed the basis of the law subsequently developed by the Federal Court as to the meaning of these two words.

In that judgment he stated that section 28(1) almost certainly did not apply to "the myriads of decisions or orders that the tribunal must make in the course of the decision-making process"[88] and he instanced six examples including decisions as to the date of hearing and decisions on requests for adjournments.[89] He also expressed doubts about situations where a decision-maker proceeded to make a final decision by stages,[90] as in *Smith, Kline & French Inter-American Corp. v. Micro Chemicals Ltd.*,[91] where the Commissioner of Patents issued his decision in two stages and it was held that only the final stage was subject to statutory appeal.[92] Finally, he referred to cases where tribunals made decisions about their jurisdiction to embark upon a particular inquiry.[93]

Subsequently, in two decisions, one by the Trial Division and one by the Court of Appeal, it seemed as if this concern of Jackett C.J. was not going to have much impact and that interlocutory rulings would be subject to judicial review under section 28 provided the other requirement was met. In *Grauer Estate v. The Queen*,[94] it was held that the decision of a hearing officer under the *Expropriation Act*, not to grant a requested adjournment was administrative and not

subject to the prohibition jurisdiction of the Trial Division.[95] However, the judge went on to say that, if the function was not purely administrative, the only way in which the denial of an adjournment could be attacked was under section 28(1) by the Court of Appeal.[96] Jackett C.J.'s statements about interlocutory matters were not mentioned. Indeed, Jackett C.J. himself, in *In re McKendry*,[97] delivered a judgment of the Court of Appeal in which no issue was raised about the availability of section 28(1) to review and set aside an interlocutory decision by a statutory decision-maker on the question of admissibility of evidence.

However, it is now abundantly clear that these decisions must be regarded as aberrations for, in a series of decisions, the Court of Appeal has basically confirmed the approach of Jackett C.J. in the *National Indian Brotherhood* case. These decisions start with *Attorney General of Canada v. Cylien*[98] in 1973 and the most prominent of them are *In re Anti Dumping Act and in re Danmor Shoe Co.*,[99] *British Columbia Packers Ltd. v. Canada Labour Relations Board*,[100] *War Amputations of Canada v. Pension Review Board*,[101] and *Center for Public Interest Law v. C.T.C.*[102].

The basic thrust of the cases seems to be that it is the final operative decision of a federal statutory decision-maker that is the primary object of the Court of Appeal's jurisdiction under section 28. To quote from the recent Trial Division judgment of Mahoney J. in *In re Peltier*:

> The meaning of the word "decision" as used in the section is the subject of a developing jurisprudence. Generally, the pattern emerging in the Court of Appeal's own judgments seems to be that it will review final orders or decisions only — final in the sense that the decision or order in issue is the one that the tribunal has been mandated to make — a decision from which legal rights or obligations flow. It will not review the myriad of decisions or orders that must usually be made along the way in any proceeding toward that final decision.[103]

Thus, with respect to interlocutory matters that the authority may have to rule on during the course of a hearing, there will normally be no judicial review under section 28. This includes, for example, issues as to the constitutional appropriateness of the authority that is about to be exercised (*B.C. Packers*)[104] as well as more mundane procedural rulings, such as, for example, the material to be taken into account (*Cylien*).[105] The only exception would seem to be interlocutory matters on which the authority is given express power to rule by its empowering statute and binding "orders"[106] that it is given authority to make as part of the exercise of its jurisdiction, for

example, an order to attend a hearing and be examined. These interlocutory decisions are seen as coming within the scope of things that a "federal board, commission or other tribunal" has "jurisdiction or power" to decide by virtue of a federal Act (in terms of section 2(*g*)). This also means that the words in section 28(1), "in the course of proceedings" are not completely empty of meaning.

Nevertheless, questions can be raised as to how far this exception goes. For example, in the *B.C. Packers* case counsel relied upon a provision which gave the Canada Labour Relations Board power "to decide for all purposes. . .any question that may arise in the proceedings".[107] In that case, the court as a matter of interpretation held that the section did not extend to rulings on whether or not the Board had constitutional jurisdiction over the matter in question[108] This, of course, may be seen as just a restrictive interpretation of the relevant provision. However, in *Center for Public Interest Law v. C.T.C.*,[109] the Court of Appeal held that an exercise of discretion by the Telecommunications Committee under a provision in its Rules not to stay proceedings until a question of law was determined was not a "decision" for the purposes of section 28(1), albeit that it was taken under a statutory instrument.[110] Similarly, in *In re Peltier*,[111] Mahoney J. ruled that the decision of an extradition judge to adjourn proceedings and remand the applicant in custody was not a "decision or order" even though it was taken under provisions in the Act.[112] These decisions indicate that not all interlocutory decisions mandated specifically by the statute are going to be looked upon by the court as being decisions or orders for the purposes of section 28.[113]

The problem is how to know where the line is to be drawn. In one of his recent judgments,[114] Jackett C.J. held that an "interpretation" given by the Pension Review Board was a "decision" for the purpose of the section on the basis (one that he had hinted at earlier)[115] that it had independent legally binding effect.[116] Exactly what he means when he says that decisions have an independent, legally binding effect is not entirely clear. Urie J., who delivered a separate judgment in this case, also thought this particular interpretation was final and binding.[117] However, he also seemed to accept that it was covered by the statute simply on the basis that it was made by the board in the exercise of powers specifically conferred on it by statute.[118] He relied on Jackett C.J.'s judgment in *Danmor* for this proposition[119] and, essentially, he seemed to accept that if the decision is one that is specifically authorized by statute, that is sufficient.

Obviously, more litigation lies ahead with respect to this particular wording. Indeed, this was indicated when Jackett C.J. was forced to admit in the *Pension Review Board* case that he would need more experience with section 28(1) before he would be willing to lay down any general rules as to the meaning of "decision or order".[120] Moreover, prior to this, in 1971, in the *National Indian Brotherhood* case he had described this as the most important question of interpretation with respect to section 28.[121]

A residual question is what happens to those "decisions" that are not subject to section 28(1) review. An answer was provided by Thurlow J. in the *B.C. Packers* case.[122] The first possibility is to wait for the ultimate decision and endeavour to use the interlocutory error as a basis for setting aside the whole process. Secondly, if a tribunal is proceeding to exercise jurisdiction that it allegedly does not have as a result of an incorrect interlocutory ruling, prohibition or a declaration may be sought from the Trial Division. Conversely, if there has been an erroneous failure to exercise jurisdiction, *mandamus* or a declaration may be sought from the Trial Division. Finally, the tribunal may in effect state a case to the Court of Appeal under section 28(4).[123] Thus, it is clear that the affected person is not without relief. All these remedial alternatives raise a policy issue to which I will return shortly. However, one further comment deserves to be made here. An argument can be made that a wrongful failure to exercise jurisdiction by a federal statutory authority amounts to a final decision, for example, refusing to certify a trade union as a bargaining agent on constitutional grounds. If that is so, then arguably *mandamus* may not be obtained from the Trial Division. Indeed, Jackett C.J. seems to acknowledge some problems here in a footnote to his *Danmor Shoe* judgment.[124] However, the availability of *mandamus* in such cases was reasserted subsequently in an appendix to his judgment in *Cutter Laboratories International v. Anti-dumping Tribunal*.[125]

Leaving the question of the precise extent of the definition of "decision or order" aside, it is worth considering the policy arguments identified in support of the Court of Appeal's restrictive interpretation of these terms. Basically, they amount to this: first, busy tribunals should not be subject to delaying and time-consuming judicial review applications in respect of all interlocutory rulings made during the course of the decision-making process; and, second, many of these interlocutory rulings, even if incorrect, may not affect the basic validity of the final decision and, therefore, to review before the final decision is quite inappropriate.[126] Furthermore, as has been

pointed out, if the tribunal is interested in a ruling on an interlocutory matter before proceeding further, it can always ask for one from the court by virtue of section 28(4).[127]

Superficially, that sounds fine. However, a look at the subsequent history of the *Canada Packers* case immediately raises doubts about whether these reasons are all that legitimate. The applicant next pursued a remedy by way of prohibition which it obtained from the Trial Division.[128] This was then upheld on appeal by the Federal Court of Appeal when the case again reached that level.[129] What all this means is that the applicant was put to the time and expense of two further court proceedings before it had the matter determined by the body to which it went in the first place.

Even assuming the Court of Appeal's interpretation of "decision" is technically correct, does such a legislative scheme really achieve any desirable results? Contrary to the assumed factual basis behind the policy arguments identified above, a statutory decision-maker is not obliged to stop proceedings once a judicial review challenge is commenced, be it an application to review and set aside or an application for the writ of prohibition.[130] He can take the risk and continue. Moreover, the decision to take the risk will not be affected by whether the application is for prohibition or whether it is to review and set aside; it will be influenced rather by the decision-maker's perception of the strength of the challenge and the inconvenience from proceeding to a conclusion and later being reviewed.

Thus, the policy reasons identified for saying that interlocutory decisions are not decisions for the purposes of section 28(1) are immediately frustrated by the availability of prohibition from the Trial Division, particularly where the interlocutory ruling is on a preliminary or collateral matter affecting jurisdiction as in *B.C. Packers*. Perhaps the almost inevitable two-stage court proceeding acts as more of a disincentive to affected persons bringing such actions than would the availability of access directly to the Court of Appeal. However, on balance, there is an argument for either eliminating entirely the possibility of this type of review, only allowing for review of the ultimate decision, or, more feasibly, providing that the forum that deals with the ultimate decision at first instance, whether the Trial Division or the Court of Appeal, should also have authority to review interlocutory decisions by that decision-maker.

This argument, of course, can be made with respect to all uses of prohibition, declaratory and injunctive relief, or *mandamus* in the Trial Division against tribunals ultimately subject to Court of Appeal review or appeal, jurisdiction, even in situations where there is an attempt to restrain or compel the body before jurisdiction is assumed.[131] In all such cases, the appropriate division would, of course, have to be given the discretion that now exists with respect to prohibition — a discretion to refuse relief on the basis of prematurity or uncertain effect of the error on the ultimate validity of the decision.[132]

Basically, this amounts to an argument that when original jurisdiction over statutory decision-making is vested in one division, jurisdiction should perhaps be extended to all aspects of those decision-makers assigned to it for review purposes — not split as at present between the two divisions by virtue of the restrictive interpretation of the word "decision" in section 28 and the consequent availability of prohibition, declaratory and injunctive relief and *mandamus* from the Trial Division. If this is accepted, then the next question is, of course, which court do you confer that jurisdiction upon. If the jurisdiction is still to be split between the two divisions of the Federal Court, how do you decide which decision-makers should be subject to the Court of Appeal jurisdiction? Is the present wording of section 28 satisfactory?

(ii) Of an administrative nature not required by law[132a] to be made on a judicial or quasi-judicial basis

The conventional wisdom of administrative law applied to arguments for application of the rules of natural justice and the availability of the prerogative remedies of *certiorari* and prohibition, always tended to a distinction between judicial and quasi-judicial functions on the one hand and administrative or ministerial functions on the other.[133] Accordingly, the implication from the language of section 28(1) that there were certain administrative functions that had to be exercised in a judicial or quasi-judicial manner seemed most strange to some people in 1971. To have an administrative function coupled with a duty to act judicially was seen as a contradiction in terms.[134]

However, there seem to be three possible interpretations of section 28(1)'s use of the administrative/judicial terminology.[135] First, "administrative" might be used in the section, not in the sense of administrative as opposed to judicial, but in the broader sense of the word, as in the expression "administrative law"; that is, pertaining to

all statutory decision-makers irrespective of classification. Secondly, the legislators may have had in mind those decisions which recognized that in certain situations, a decision-maker exercising essentially administrative functions (meaning, in this context, broad policy-oriented decision-making functions) might at some stage be obliged to give some limited sort of hearing to those affected before making the ultimate policy decision.[136] Finally, it may be that the legislators were conscious of English developments suggesting that perhaps all statutory decision-makers irrespective of classification were subject to certain procedural constraints — the so-called duty to act fairly.[137]

Of these three, the second interpretation is probably most reflective of the draftsmen's intentions. In the first, the use of the term "administrative" is really redundant and the third interpretation assumes a very ready acceptance of something which at that stage had only begun to evolve in England.[138] Moveover, this tends to be borne out by the attitude of the Federal Court of Appeal[139] and, indeed, some of the Trial Division judges.[140] Certainly, in a couple of decisions,[141] the English fairness approach has been referred to with approval. For the most part, however, the judges do not talk the language of fairness but rather they inquire whether there is any judicial or quasi-judicial element to be found in an essentially administrative decision.

Not, however, that this makes the prediction of whether it is a section 28 matter any easier. The most that can be said is that the Federal Court of Appeal has, with two notable exceptions, shown a considerable readiness to find judicial or quasi-judicial elements in decision-making processes in order to give itself jurisdiction. Indeed, in some cases the matter seems to pass by without debate, as exemplified, seemingly, by *Consumers' Association of Canada v. Postmaster General*.[142] Here the Federal Court of Appeal set aside the refusal of the Postmaster General to allow certain items to be registered as second class mail. No question seems to have been raised about the nature of that decision, though in conventional terms it would seem very difficult to argue that this was in any sense a decision involving procedural obligations.

The two perceptible exceptions to the liberality of the court in finding jurisdiction under section 28 are matters involving, first, parole and penitentiary discipline and, second, interlocutory or preliminary decisions. Both these anomalies result in large measure from other forces, particularly in parole and penitentiary discipline

matters.[143] The Supreme Court of Canada decisions in *Ex parte McCaud*,[144] *Howarth v. National Parole Board*[145] and *Mitchell v. The Queen*[146] constitute an almost insuperable obstacle to any desire the Federal Court of Appeal might have to claim jurisdiction to review penitentiary or parole decisions.[147] Indeed, along the same lines, it is interesting to contrast the Federal Court of Appeal decision in *Lazarov v. Secretary of State of Canada*[148] with that of the Supreme Court of Canada in *Prata v. Minister of Manpower and Immigration*.[149] The Federal Court was willing to impose natural justice requirements on a Minister in a citizenship matter, but the Supreme Court refused to do so in a basically identical deportation situation. The Federal Court of Appeal's attitude that the parole/penitentiary cases are *sui generis* also seems to be accentuated by its judgment in *Hardayal v. Minister of Manpower and Immigration*[150] where Urie J. took great pains to distinguish *Howarth* and the parole cases from a situation involving revocation of permission to remain and work in Canada.[151]

When one comes to interlocutory or preliminary decisions, the difficulty lies, in part, with the general law of judicial review and, in part, with the question already discussed — the meaning of the word "decision" in section 28(1) of the Act. For example, when one is dealing with bodies that merely recommend action or make a report, the common law, and notably decisions such as that of the Supreme Court of Canada in *Guay v. Lafleur*,[152] makes it very difficult to argue that a judicial or quasi-judicial element is involved.[153] However, sometimes there may be hints of that in the empowering Act, but even then *Lingley v. New Bruswick Board of Review*[154] clearly indicates that the Federal Court of Appeal is not going to consider the product of such procedures a "decision or order".

Many other interlocutory rulings are, as we have seen, also eliminated from the ambit of section 28 by the meaning attributed to the term "decision or order". However, even if they are decisions that the tribunal or statutory authority is explicitly empowered to make in the course of its decision-making process, there is still a chance that they will not be subject to section 28(1) because they are considered to be purely administrative.

Henri Brun develops this argument in a recent article,[155] where he instances, *inter alia, In re Sabre International*,[156] a case involving a provisional determination of dumping by the Minister of National Revenue. Here as in many cases at common law, this

provisional determination was classified as being purely administrative because of the later opportunity for a hearing. One also sees this attitude emerging in the 1976 decision of *Burnbrae Farms Ltd. v. Canadian Egg Marketing Agency*,[157] where the Court of Appeal held that the agency's decision to hold a show cause hearing with respect to the applicant's licence was a purely administrative matter not subject to review under section 28, particularly as there was a full hearing at the show cause stage. This notion of purely administrative steps along the way also emerges in *Voyageur Inc. v. Syndicat des chauffeurs de Voyageur Inc.*[158] There the Federal Court of Appeal refused to apply section 28 in relation to a decision by the Canada Labour Relations Board to hold a representation vote, though here, as in the other two instances, any errors of law or jurisdictional defects at that stage could almost certainly be made a ground for review under section 28 by attack on the final decision. The question to be asked again is whether this dividing of the decision-making processes into two separate stages for review purposes is all that desirable. Is it really productive to have the preliminary stages of a decision-making process subject to Trial Division scrutiny (with all the associated remedial difficulties) and the ultimate decision subject to Court of Appeal review?

The irony of the matter is rather dramatically illustrated by a recent decision of the Federal Court of Appeal in *Penner v. Electoral Boundaries Commission for the Province of Ontario*.[159] This involved an attempt to have the recommendations of the federally-appointed commission set aside. The process for re-distribution of federal electoral boundaries is quite complex and need not be entered into here. Suffice it to say that the report of the Commission is one stage in the process in which the ultimate result is a representation order proclaimed by the Governor in Council. The main thrust of the judgment was that the report was not a decision or order and was therefore not subject to section 28. It was but one of the steps along the way, albeit a condition precedent. However, one suspects that even if the court had not decided the case on this basis, it could have avoided review under section 28 by describing the matter as purely administrative. Moreover, in this particular case, the ultimate decision would not be subject to review under section 28 because decisions of the Governor in Council are exempted by section 28(6). Indeed, the court noted that to allow review in this case would be doing indirectly what it could not do directly, *i.e.*, set aside the Governor in Council's proclamation. Where this left the applicants was not specified, though one can speculate on the possibility of an action for a declaration from the Trial Division.[160]

Most of the discussion about section 28 centres on the difficulty of the concepts of administrative and judicial functions as a basis for the jurisdiction of a court. However, the way in which the section is framed opens the possibility for another type of decision to be subject to section 28 review — namely decisions of a legislative nature. Only one type of decision is *excluded* — administrative decisions not involving judicial or quasi-judicial elements. If one accepts that legislative decisions form a third category and are not encompassed by the excluded class, then they too will be subject to the exclusive review jurisdiction of the Federal Court of Appeal. This was adverted to by Jackett C.J. in an article on the Court of Appeal.[161] Subsequently, he has taken this up in the case of *War Amputations of Canada v. Pension Review Board*,[162] where he tentatively held that an "interpretation" of the governing Act given by the Pension Review Board was of a legislative nature and therefore within the ambit of section 28. Of course, the most prominent kind of subordinate legislative act is the making of regulations by the Governor in Council. However, by virtue of section 28(6), decisions of the Governor in Council are not subject to section 28 review,[163] leaving other forms of subordinate legislation possibly within the ambit of the section should the Chief Justice's view prevail. Given that lack of authority is, save in very exceptional circumstances, the only ground for review of legislative acts and given the grounds for review set out in section 28(1), this position would seem to be somewhat anomalous.

It was virtually inevitable that the manner in which the Court of Appeal's jurisdiction was defined would cause much litigation. Not only did the section adopt one of the most troublesome concepts in administrative law but also it used it in a somewhat different manner than is usually the case. As a result, confusion was built upon confusion. Aside from saying that the Federal Court of Appeal has assumed jurisdiction liberally under this formula, six years have not eased the problems of predictability in this area and, while a reasonably consistent philosophy may be identifiable in the Court of Appeal judgments on this point, no such pattern can be discerned from the various judgments of the nine Trial Division judges, who must individually grapple with this problem. Added to this is the further difficulty that the Federal Court of Appeal and the Supreme Court of Canada may presently be on somewhat different tacks in determining situations where a function is to be exercised in a judicial or quasi-judicial manner. All this points to the need for a different method of assigning original jurisdiction between the two divisions of the Federal Court, perhaps along the lines of simply designating the bodies subject to Court of Appeal jurisdiction — *e.g.* major

administrative tribunals, Ministers of the Crown, directors of penitentiaries, *etc.* Alternatively, these problems could be completely avoided by assigning *all* original jurisdiction to one of the two divisions. Only by adopting one of these alternatives will needless litigation be avoided. The ease with which proceedings can presently be transferred from one division to the other is not an adequate response.[164] Even accepting that, the arguments as to which is the appropriate division must still be considered and consequently some delay is inevitable.[165]

(iii) Other requirements

It was noted earlier that there are two requirements for the Court of Appeal's original review jurisdiction under section 28(1). There must first be a "decision" or "order", and, second, it must not be one "of an administrative nature not required by law to be made on a judicial or quasi-judicial basis". However, in a broader sense, there are four other requirements that must be examined. They are

(a) that the application be made in the time specified by section 28(2),

(b) that the application be made by someone with standing as defined in section 28(2),

(c) that the application not relate to one of the bodies named in section 28(6), and

(d) that recourse to section 28 not be precluded by section 29.

(a) *Limitation Period for Section 28 Applications*

Unless an extension is granted by the Court of Appeal or a judge of that court, applications for judicial review must be made

> . . .within ten days of the time the decision or order was first communicated to the office of the Deputy Attorney General of Canada or to that party by the board, commission or other tribunal.[166]

Extensions may be sought either before or after the expiration of the ten-day period.

Compared with the normal common law rules,[167] ten days is a remarkably short time in which to have to give notice of an application. At common law, relief is not normally refused unless there has been a delay of six months or more,[168] and other statutory provisions, *e.g.*, the Nova Scotia Code of Civil Procedure respecting

certiorari,[169] normally fix the time limit at six months. Undoubtedly, the provision stems from a firm policy that the affairs of administrative tribunals should not be kept in limbo for any length of time by the possible threat of ligitation, and that if there is to be litigation, it should be commenced and dealt with promptly (see section 28(6)). There is in fact much to be said for this policy, particularly since the Court of Appeal has not required applicants to state their grounds at the time of making an application[169a] and also since the applicant is able to seek an extension from the Court. Nevertheless, it is worthy of comment that no limitation period is spelt out with respect to section 18 remedies and, presumably, as far as they are concerned the old common law rules for refusal of relief on the grounds of undue delay continue to apply.[170] It is questionable whether such a distinction should be made between sections 18 and 28.

In allowing permission to file beyond the ten-day period, the judges have been quite strict.[170a] Not only must there be a satisfactory explanation of why an extension is necessary,[171] but also the applicant must show the court that his case has a good chance of success.[172] Leave will certainly not be granted if the case is one that could be the target of a successful application under section 52 to be struck out on the grounds of lack of jurisdiction or not having been brought in good faith.[173] This may be a considerable obstacle given the apparent readiness of the court to use section 52.[174]

(b) *Locus Standi under Section 28*

At a time when the rules as to *locus standi* have been much litigated in Canada,[175] there has been remarkably little activity in the Federal Court on the meaning of the term "any party directly affected", which is the statutory form of standing created in section 28(2).[175a]

Superficially, it might be thought that the statutory form of standing in section 28(2) is in some ways narrower and in others wider than the common law rules. At common law, for example, it has generally been asserted, indeed quite recently by Laskin C.J. in *Thorson v. Attorney General of Canada*,[176] that *certiorari* and prohibition may be sought by "strangers" to the matter,[177] an expression that presumably extends to people other than "any party directly affected". On the other hand, just because a person is a "party" to proceedings in the sense of being allowed to appear has not at common law necessarily assured him of standing in subsequent judicial review proceedings,[178] though presumably if that person was

"directly affected" as well he could not be gainsaid. A final preliminary point is that at common law the hallmark of standing cases has in large measure been the discretion exercised by the courts.[179] Section 28(2) seemingly attempts to replace the discretion of the common law with a rigid rule, though one that undoubtedly may need clarification. Who is a "party"? When is someone "directly affected"?

So far, the standing provision seems to have been litigated only twice. In *Commonwealth of Puerto Rico v. Hernandez*,[180] the Supreme Court of Canada held that the Commonwealth could make a section 28 application. Technically, it might be said that the parties to the proceedings in question were the R.C.M.P. officers on whose information a warrant of apprehension was issued and Hernandez who had been apprehended but subsequently released by virtue of the decision which was the subject of the challenge. However, at the hearing before the extradition judge, the Commonwealth had been represented by counsel and it was the Commonwealth, who through the United States, requested the extradition. Thus, the Supreme Court saw no obstacle to the Commonwealth's standing, even though the Attorney General of Canada could by the express terms of section 28(2) also have made a section 28 application.[181]

This liberal reading of the term "party" was carried forward by the Federal Court of Appeal in *John Graham & Co. Ltd. v. C.R.T.C.*[182] This concerned the C.R.T.C.'s approval of the transfer of shares in a company in which the applicants were minority shareholders. According to Urie J., the applicants were not parties in the sense that they could be required to appear and file documents.[183] However, he noted that they had been permitted to intervene and indeed were just as directly affected as the applicant for approval of the share transfer, in the sense that the value of their shares and dividends could be affected by the success of the application.[184] Accordingly, he was prepared to hold that they were proper parties for the purposes of section 28(2).[185] He, however, found it unnecessary to decide whether officers of one of the shareholding companies and of the company itself had standing in their capacity as officers.[186]

The common feature of both cases is that the applicants had been accorded recognition as parties by the decision-maker under review. What would have happened if this were not the case is unclear, *e.g.*, if the minority shareholders in the *John Graham* case were not even given notice and this was their ground of complaint, perhaps as

people who *should have been* parties. The only other point worth making is that the *direct effect* relied upon by Urie J. in *John Graham* is arguably quite *indirect*. Their status or rights as shareholders cannot be affected by the order. The only effect is the indirect one of share and dividend fluctuations that may result.[187] Presumably, this is another indication of the flexibility on the part of the court in interpreting section 28(2). The question, of course, is whether the case has any predictive value.

In this respect, doubts are raised by the approval given to the Privy Council decision of *Durayappah v. Fernando*[188] by Jackett C.J. in two earlier decisions. In *Durayappah*, the mayor of a dissolved municipal corporation was denied standing to challenge the dissolution on the ground of breach of the rules of natural justice. It was held that as breach of the natural justice rules only makes a decision "voidable" rather than "void", the mayor, not being "the party affected", could not launch a challenge.[189] Only the municipal council could do this. This reveals a very narrow view of what constitutes a "party affected" and, given its acceptance by Jackett C.J. in *In re North Coast Air Services Ltd.*[190] and *Medi-Data Inc. v. Attorney General of Canada*,[191] it perhaps forebodes the possibility of a much narrower interpretation of the term than was suggested in the *John Graham* case. However, it must be said that in the two cases mentioned, the Chief Justice was concerned not with standing, but with the effect of a breach of the rules of natural justice.

On the other hand, two recent decisions of the Supreme Court of Canada, admittedly on a different point, reflect a similar attitude. In *Transair Ltd. v. Canadian Association of Industrial, Mechanical and Allied Workers*[192] and *Central Broadcasting Co. Ltd. v. Canada Labour Relations Board*,[193] both appeals from section 28 applications heard by the Federal Court of Appeal, the Supreme Court held that the authority being challenged only had standing to appear before the reviewing court if an issue of jurisdiction was raised, and jurisdiction was defined in a narrow sense to exclude allegations of breach of the natural justice rules[194] and also, seemingly, the asking of wrong questions.[195] While not directly analagous to *Durayappah*, a possible implication from these two decisions is that whether one is a "party directly affected" under section 28(2) may depend, as it did in *Durayappah*, on the nature of the error alleged. If so, it is a strange twist that the law does not need.

Under section 52(*a*) the Court of Appeal has the authority to quash proceedings brought before it on the ground of lack of

jurisdiction or whenever those proceedings are not taken in good faith. It is a nice point whether an issue of standing should be subject to determination on such an application. In *Carota v. Jamieson and Lessard*,[196] an action for a declaration, an injunction and *mandamus* under section 18, Collier J. was sceptical as to whether Rule 419, a broader provision than section 52(*a*), relating to actions, was an appropriate forum for the determination of questions of standing. However, he did accept that Rule 474, by which the Court can on application determine questions of law pertinent to a matter before it, might well be used, as it subsequently was in that case.[197] In so far as Rule 474 appears to apply to section 28 matters, this is presumably one way a question of standing on a section 28 matter could be determined prior to the hearing of the application.

(c) *Section 28(6) — The Excluded Categories*

It may well be that the purpose of section 28(6) was completely to exclude judicial review of the named bodies on the basis that their functions were either too politically sensitive (Governor in Council, Treasury Board) or the interference of the ordinary courts was simply not considered appropriate. However, as *Desjardins v. National Parole Board*[198] indicates, at least in relation to the Governor in Council, that object may not have been achieved completely, in that, if the Court of Appeal does not have jurisdiction, the possibility for Trial Division review authority, taken away by section 28(3) is open.

(d) *Section 29*

The obvious intention of section 29 is to prevent overlap between statutory rights of appeal and applications for judicial review under either section 18 or 28. If there is a statutory right of appeal, then section 18 or 28 does not apply — at least to the extent that there is a statutory right of appeal.

The use of these words "to the extent that it may be so appealed" therefore raises the possibility that if the grounds of complaint do not fall within those for which a right of appeal is available, then judicial review may be sought under either section 18 or 28 (whichever is appropriate) provided of course the grounds of complaint fall within these sections. In some sense of course this possibility flies in the face of the legislature's careful spelling out of the grounds upon which appeal is available. The statutory limitations are avoided by the back door of judicial review.

However, this now seems less of a possibility than at the time of the statute's enactment in 1970. At that time, the potential for such an

argument was most clearly raised by a situation where there was a statutory appeal on questions of law and jurisdiction and the ground of complaint was factual error of a non-jurisdictional kind.[199] Here, there seemed to be room for some judicial review, not excluded by the statutory appeal provision, as under section 28(1)(*c*) there may be review where a board, commission or other tribunal

> based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

Subsequently the jurisprudence has virtually destroyed the possibility of this argument. In *Commonwealth of Puerto Rico v. Hernandez*,[200] Thurlow J. described the ground of review provided for in section 28(1)(*c*) as a more explicit category of error of law, the subject area of section 28(1)(*b*).[201] This has recently been confirmed in *Mojica v. Minister of Manpower and Immigration*,[202] where proceedings based on section 28(1)(*c*) were struck out because they covered the same ground as the statutory right of appeal from the same decision, a right covering law and jurisdiction. This would seem to leave open only one possibility for judicial review under section 28 in the face of a statutory right of appeal. It could be argued that a general right of appeal or a right of appeal on questions of law only does not embrace jurisdictional errors or breach of the rules of natural justice and that, therefore, these must be raised under a section 28 application. However, this seems quite unlikely.[203]

(iv) Section 52

Paragraph (a)

This provision, which gives the Court of Appeal authority to quash applications under section 28,[204] has been used quite frequently by the Federal Court of Appeal. For example, in *Center for Public Interest Law v. C.T.C.*[205] and *B.C. Packers v. Canada Labour Relations Board*,[206] it was employed in situations where the court did not consider that a "decision or order" was involved. In the recent decision of *Re Johnston and Attorney General of Canada*,[207] the court quashed the application on the ground that the action being challenged was of a purely administrative nature not "required by law to be made on a judicial or quasi-judicial basis".[208] Indeed, contrary to what was said earlier,[209] this determination of preliminary points on section 52(*a*) proceedings may indicate that standing also could be dealt with as a ground for quashing, a position that might be further sustained by the quashing of the proceedings in *Mojica v. Minister of*

Manpower and Immigration[210] on the basis that section 29 precluded review.

In all these cases involving preliminary points or jurisdictional questions, the application to quash has involved the legal points in issue being fully argued. However, where the question is one respecting the merits of the application, one would not expect the merits to be fully canvassed at that stage. This is borne out to a certain extent by *Wall v. Interprovincial Pipe Line Ltd.*[211] where the section 28 application was declared to be hopeless and one where the delay in awaiting a determination by the Court of Appeal might prejudice the respondent. What this suggests is that the court must be convinced that there is little or no chance of success and, perhaps also, that inconvenience to the decision-maker or to the parties would be involved in waiting for the eventual section 28 application to be heard.

Paragraph (d)

Perhaps only two points need be made here. First, the power of the court to refer a matter back to the initial decision-maker, with directions, gives the court flexibility where it is concerned that a demonstrated error may not have affected the ultimate result.[212] Second, this subsection also gives the court the equivalent of *mandamus* jurisdiction to compel the redetermination of the matter in accordance with the law, a factor that may have some pertinence in deciding whether *mandamus* may still be sought from the Trial Division once a decision has been made.[213] It might also be said that the power to give directions could be extended in effect to a reversal of the statutory decision-maker on the merits, which is the province of the appellate function under section 52(*c*).

2. Section 28(4)

As already seen, Thurlow J. in the *B.C. Packers* case suggested[214] that one way of having a question as to the constitutionality of proceedings determined was for the statutory authority to refer the point to the Federal Court of Appeal under section 28(4).[215] More recently, this method has been used to determine whether the Chairman of the National Energy Board was disqualified from a

hearing because of a reasonable apprehension of bias,[216] whether a hearing by the Tariff Board could proceed to a conclusion notwithstanding the death of one of the three members conducting the hearing,[217] and, whether regulations promulgated under the *Unemployment Insurance Act* were *ultra vires*.[218]

These three cases have in common questions raised in the context of specific proceedings. In two of them, the ability of the tribunal to continue lawfully depended on the answer to the question. In the third, the answer to the question was crucial to the substantive issue to be decided. Obviously, the ability of a tribunal to use this section has the potential effect of saving a great deal of time. This is dramatically illustrated by *In re Canadian Arctic Gas Pipeline Ltd.*,[219] where at the outset of what was obviously going to be a lengthy hearing, the Board was able to have the question of the Chairman of the National Energy Board's alleged bias settled immediately rather than having to risk a quashing once the proceedings were over should an interested party care to raise the point then.

There are, however, limitations on the availability of this route as *Reference re Public Service Staff Relations Act* exemplifies.[220] First, it must be a question that the tribunal has to answer as part of its decision-making process, though as the *Canadian Arctic Gas Pipeline* and *Tariff Board* cases illustrate, the question may not necessarily be one which relates directly to the substance of the issue before the tribunal. Secondly, the question must have already arisen for decision in the course of the tribunal's proceedings to the extent that the tribunal must be able to provide the court with all of the findings of fact and material that it would need to answer the question itself.[221] In other words, the question must not be hypothetical or academic but real and ripe for determination. It need not determine the outcome of the proceedings. However, according to Pratte J. in *Martin Service Station Ltd. v. Minister of National Revenue*,[222] one of the possible answers to the question asked must be decisive,[223] *e.g.*, if the Chairman of the National Energy Board is found to be subject to a reasonable apprehension of bias, that is decisive. The proceedings should stop. However, if he is not so found, the proceedings continue.

Under this section, the question must be either one of law, jurisdiction, or practice or procedure and, in the *Canadian Arctic Gas Pipeline* case, the natural justice/bias issue was treated by the Federal Court of Appeal as probably being a question of jurisdiction as well as one of law.[224] Arguably, it was also a question of procedure as well.

D. ORIGINAL JURISDICTION OF THE TRIAL DIVISION UNDER SECTION 18

Two points already made merit repeating. (1) The jurisdiction of the Trial Division under section 18 is only with respect to "federal board[s], commission[s] or other tribunal[s]"; (2) That jurisdiction is exercised by way of the old common law judicial review remedies with the exception of *habeas corpus*

In 1971, Gordon F. Henderson, Q.C. expressed the following hope:

> The opportunity exists to give each of these writs and the grant of a declaratory order a wide meaning to ensure a realistic protection of the subject against bureaucratic action of the state.[225]

Now, almost six years later, critics are split on the way in which the Trial Division has interpreted its mandate under section 18. The title of Norman M. Fera's article, "Conservatism in the Supervision of Federal Tribunals: The Trial Division of the Federal Court Considered",[226] speaks for itself. Lemieux and Vallières, in discussing the court's interpretation of its remedial powers, are more satisfied.[227] They speak of "le libéralisme procédural de la Cour".[228] They draw this conclusion from a survey of a range of cases in which various judges in the Trial Division either evidenced flexibility in the grant of relief or were prepared to disregard deficiencies in the way in which the applicant or plaintiff framed his proceedings.[229] Even accepting Lemieux and Vallières' general conclusion, there have however been instances in which the formal requirements of the old remedies in their new home have led to a failure on the part of the court to reach the merits of what may well have been arguable cases.

In *"B" v. Department of Manpower and Immigration*,[230] the applicant was seeking a writ of prohibition and a declaration with respect to a one person Commission of Inquiry appointed under the Federal *Inquiries Act* which was investigating allegations against the applicant, an employee of the Department of Manpower and Immigration at Montreal, concerning sexual misconduct with females applying for landed immigrant status. Both remedies were refused on technical grounds in a judgment where the availability of prerogative and non-prerogative remedies was dealt with in some detail. Among the propositions advanced were the following:

1. A declaration was not available because under the Federal Court Rules a declaration must be sought by way of action.[231]

2. Furthermore, the Commission of Inquiry was not a suable entity and therefore could not be the subject of an action. In an action, the appropriate defendant would be the Attorney General.[232]

3. While the Rules contain provisions for the prerogative writs to be sought by way of statement of claim rather than by way of originating notice of motion, this had not been done here and, furthermore, the proper defendant in such a case would once again be the Attorney General and not the Commission.[233]

4. The application for prohibition, whether by way of statement of claim or by way of originating notice of motion, could not proceed anyway because a body such as the Commission, which merely investigated and made a report, was not a judicial or a quasi-judicial body, a prerequisite for the writ of prohibition.[234]

5. If *certiorari* or prohibition is available, the equitable remedies of declaration and injunction are not available and *vice versa*.[235]

6. An entity capable of being sued is not subject to the prerogative writs and an entity not capable of being sued is not subject to equitable relief.[236]

7. Injunctions and *mandamus* are not available against judicial bodies nor against the Crown and, for the latter reason, the Attorney General could not be sued for those remedies.[237]

These propositions will not be analyzed here.[238] Suffice it to say that some at least are controversial as a statement of the old law of remedies. More to the point, they indicate that an intricate task is involved in selecting the correct remedy in certain situations. Indeed, in this case it would seem that the only possible remedy available to the applicant in respect of any situation that was likely to arise before the Commission was an action for a declaration commenced under Rule 603 of the Federal Court Rules.[239] In contrast, it is interesting to note that if the case had arisen in British Columbia, Ontario or Nova Scotia, the plaintiff, even if restricted to seeking declaratory relief would by virtue of their new rules relating to judicial review,[240] at least have had the option of using a simpler procedure. Of course, in this case the other side refused to consent to treating the matter as an action with the Attorney General as defendant[241] and, in other cases where such consent has been forthcoming or the defect otherwise waived, the court has been willing to proceed.[242] Nevertheless, the

decision dramatically highlights the fact that it is still quite possible to be defeated by the formal requirements of the old remedies at the Trial Division level. Perhaps the thickets are not normally so dense, but the case for a simplified comprehensive remedy for the Trial Division appears overwhelming. After all, it was accepted with little debate at the Court of Appeal level.

Let me now turn to a brief survey of the named remedies.

1. *Certiorari*

It is a nice question whether *certiorari* is available from the Trial Division. To be sure, section 18 mentions *certiorari* explicitly. However, at least in conventional terms, it can be strongly argued that the exclusive original jurisdiction of the Court of Appeal occupies the field of *certiorari's* operation completely.

By a quirk of statutory drafting, *certiorari* was available from the Trial Division with respect to pre-June 1, 1971 decisions or orders, this being the result of section 61 which limited the Court of Appeal to decisions or orders made after the Act came into force. Indeed, like virtually all the judicial review provisions of the *Federal Court Act*, considerable jurisprudence built up around this temporary problem.[243]

Another possibility, though an unlikely one, is that the Trial Division may entertain an application for *certiorari* against one of the bodies excepted from the Federal Court of Appeal's original jurisdiction by section 28(6), *e.g.*, a proceeding for a service offence under the *National Defence Act*. It also seems clear that matters which are not "decision[s]" or "order[s]" for the purposes of section 28, such as interlocutory rulings, are almost certainly not reviewable on *certiorari* either.[244] Moreover, the one post-June 1, 1971 case where *certiorari* was granted by the Trial Division, *In re MacDonald*",[245] was strongly criticized on appeal.[246]

Indeed, there are a number of clear statements by Trial Division judges supporting the proposition that the whole field of *certiorari* is occupied by section 28(1), leaving no jurisdiction in the Trial Division to grant that writ.[247] That would almost seem to exhaust the possibilities. However, there may just be room for the remedy in

certain very limited circumstances. In England, there has been limited acceptance of the view that the classification of a function as judicial or quasi-judicial is no longer necessary for *certiorari* to be available.[248] Acceptance of this rule by the Trial Division would, of course, make the remedy available at that level with respect to purely administrative functions and this is a possibility seemingly left open by the judgment of Pigeon J. in *Howarth v. National Parole Board* with respect to purely administrative decisions not coming under section 28.[249] In combination with the English decision of *R. v. Hillingdon London Borough Council, Ex parte Royco Homes Ltd.*, this might be seen as allowing for the availability of *certiorari* from the Trial Division to quash a purely administrative decision taken in a procedurally unfair manner. As yet, however, the Trial Division judges have not shown themselves susceptible to arguments for procedural fairness at a purely administrative level. So far, the only mention of the duty of fairness extended no further than the duty to act in good faith[250] and, indeed, *Howarth* has been applied at the Trial Division level as though it were determinative of the whole question of any procedural protections with respect to purely administrative functions.[251]

2. Prohibition

Unlike the *certiorari* jurisdiction of the Trial Division, the prohibition jurisdiction definitely has some substance. Indeed, early in the career of the court, it was established that prohibition lay with respect to boards, commissions and tribunals, the final decisions of which would be subject to review under section 28.[252]

For the most part, the grant of prohibition by the Trial Division has been relatively uncontroversial.[253] Notably, the judges have imposed the traditional requirement that the function in issue must be of a judicial or quasi-judicial nature.[254] Also, from time to time, they have recognized the discretionary nature of the remedy.[255] There are, however, two possible points of controversy. First, is there any possibility of prohibition being awarded after "a decision or order" has been made? Secondly, what about the limitations apparently imposed on the availability of the writ by *"B"*[256] and outlined above?[257]

The conventional wisdom has always been that "...[p]rohibition will not lie unless something remains to be done that a court can prohibit".[258] deSmith, however, also talks about both *certiorari* and prohibition being potentially available at the same time; *certiorari* to quash an order that has already been made, prohibition to prevent further proceedings.[259]

As already noted the better view appears to be that something that is not "a decision or order" for the purposes of section 28 will not be reviewable on *certiorari* either.[260] However, this ignores the question whether prohibition will be available as well as a section 28 application when an interlocutory "decision or order" is involved, *i.e.*, a decision or order that a tribunal is specifically empowered to make in the course of its decision-making process.

In so far as the prohibition sought in such a case is premised upon the invalidity of further proceedings because of the "decision or order", section 28(3) would appear to oust the possibility of relief — "...the Trial Division has no jurisdiction to entertain *any* proceeding in respect of that decision or order [emphasis added]". However, the precise point does not appear to have been litigated. Moreover, there is a conflict of authority on the more general issue of the availability of prohibition once a *final* decision has been made.

In *Sadique v. Minister of Manpower and Immigration*,[261] Cowan D.J. held that prohibition was not available to prevent the execution of a deportation order once the proceedings were over. He held this, not on the basis of a section 28(3) argument, but because there was nothing left to prohibit since the inquiry had been concluded.[262] By inference, he may well have been saying that the remedy was not available because the judicial or the quasi-judicial part of the process was over and all that was left was the purely administrative function of executing the order — not appropriate for prohibition. However, in *Kalicharan v. Minister of Manpower and Immigration*,[263] a more recent case, prohibition was granted to prevent the execution of a deportation order, thus opening up the possibility, not only that prohibition will be available as long as there is any stage of the process left to be completed, but also that the remedy will in certain situations be available even if there is a "decision or order" reviewable under section 28(1).

There does not seem to be any authority to support the point in *Re "B"*[264] that prohibition is not available with respect to a suable entity.[265] Indeed, in deSmith there is not even a hint of such a

limitation,[266] examples being cited of relief of this kind being awarded against municipal corporations.[267]

3. *Mandamus*

The same type of problems as exist with prohibition are also possible with *mandamus*. If jurisdiction is wrongfully declined by an administrative tribunal, does that amount to a "decision" so that section 28(3) excludes the possibility of *mandamus* to compel the exercise of the jurisdiction? Does this depend upon whether the matter is one over which the decision-maker is given explicit authority in the empowering statute?[268] Once an affirmative decision has been taken, does *mandamus* lie to compel the legal duties that may result from that decision?[269]

These problems have already been adverted to. It is sufficient to reiterate that for the most part the answers are unclear, though it would seem to follow from *Monsanto Co. v. Commissioner of Patents*[270] and *Bay v. The Queen*,[271] that *mandamus* will be available where legal duties are not fulfilled after a decision which establishes the applicant's right to the performance of those duties. In such cases, the failure to implement the consequences of the "decision", would not seem to be subject to judicial scrutiny under section 28 but only by way of *mandamus*.

Aside from this, the disposition of *mandamus* applications under section 18 has been quite standard,[272] it being accepted, for example, that *mandamus* does not lie against the Crown.[273] However, *"B"*[274] once again raises a problem. There it is suggested that *mandamus* is not appropriate with respect to bodies subject to *certiorari* or prohibition,[275] *viz.*, those exercising judicial or quasi-judicial functions. It is difficult, if not impossible, to find any support for this in the cases, and it simply means that another point of unnecessary confusion has been introduced into the law of remedies. Incidentally, the same suggestion is made in *Monsanto*.[276] However, it is very difficult to reconcile with the advice given by the Court of Appeal in *Cylien*,[277] *Cutter Laboratories*[278] and *Danmor*[279] that where a body which is otherwise subject to section 28(1) review wrongly declines jurisdiction the appropriate remedy may be *mandamus*. It is also inconsistent with the recent Supreme Court of Canada decision in

Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association[280] where *certiorari* and *mandamus* were sought together without any suggestion being made that this was improper.[281]

4. Declaration

In considering the availability of the declaration against federal statutory authorities under section 18, it is perhaps appropriate to start off with Rule 603. This provides that declaratory proceedings must be commenced by way of action under Rule 400[282] and is reinforced by Rule 600(4) to the effect that Rule 400 applies to any action for "a declaration or otherwise against the Attorney General of Canada or other Minister of the Crown". In contrast, proceedings for any of the other section 18 remedies, except where the Attorney General or the Crown is involved, may be sought by either action or application under Rule 319.

This, of course, means that the remedies can be combined in the one proceeding,[283] but it must be done by way of action if a declaration is involved. Exactly why the possibility of seeking a declaration by way of application rather than action has not been allowed is difficult to see, particularly since injunctions can be sought by either of the two methods. Nevertheless, litigants continue to seek a declaration by way of application and, as mentioned already, the defect has been overlooked on occasion,[284] though in at least three cases it has proved fatal to the applicant's case.[285]

It also must be noted that the assertion that a declaration can be combined with other modes of relief including the prerogative writs ignores *"B"*.[286] There it was stated that prerogative and non-prerogative relief cannot be combined, first, because *certiorari* and prohibition are incompatible with declaratory relief[287] and, secondly, because the declaration is only available against suable entities while prerogative relief may only be sought against non-suable entities.[288]

There is in fact some Canadian authority for the proposition that declaratory relief is not available in *certiorari* (and prohibition) territory[289] but to what extent this is accepted remains unclear. Robert F. Reid (now Reid J. of the Ontario High Court) describes the situation as "uncertain"[290] and the authority in favour of the proposition in its strictest sense seems confined to Ontario.[291]

As to the second proposition above, there is authority which holds that a declaration may only be sought against a suable entity in the sense that the relevant statute must make the statutory authority amenable to suit.[292] However, as was pointed out by Addy J. in *Re "B"*,[293] there is also authority in the opposite direction, particularly in the Labour Relations Board context.[294] However, he decided to take the more restricted approach, despite the wording of section 18 which, on its face, gives the court authority to "grant declaratory relief against *any* federal board, commission or other tribunal". This, he held, had to be read subject to the general law which imposed the suable entity requirement.[295]

As Lemieux and Vallières note,[296] one of the potential values of the declaration at present under the Act may be with respect to matters that either do not come within the ambit of section 28 because they do not amount to a "decision or order",[297] or where prohibition is not available because the function in question is not of a judicial or quasi-judicial nature.[298] However, the authors caution against[299] the effects of the judgment in *"B"*.[300] Nevertheless, that decision does not appear to eliminate these possibilities provided a suable entity is involved. Indeed, the court seems to be saying that a declaration would have been an appropriate remedy to seek in that case if the form of proceedings had been an action and if the Attorney General had been made the defendant.[301]

Finally it should be mentioned that there is some uncertainty as to whether a declaration is available under the *Federal Court Act* where an alternative remedy is *habeas corpus*, available from the provincial superior courts,[302] *e.g.*, declaration as to unlawful detention in custody because of a wrongful computation of entitlement to remission.[303] Indeed, this same possibility exists with respect to *mandamus* — *mandamus* to compel a correct computation of entitlement to remission.[304] As Lemieux and Vallières note,[305] this also opens up the undesirable possibility of conflict between the two jurisdictions on questions of interpretation.

5. Injunction

As noted when discussing the declaration, injunctions are available by way of application or action under the Act, and whether this form of remedy can be successfully combined with an attempt to

secure prerogative relief depends upon whether the *dicta* in *"B"*[306] are accepted. Whether an injunction is available as an alternative to prohibition when a judicial or quasi-judicial function is in issue is also brought into question by *"B"*.[307]

So far, as noted by Lemieux and Vallières,[308] injunctions have not been used much in Trial Division proceedings. They are also not available against the Crown.[309]

6. *Quo Warranto*

There appears to be only one case where *quo warranto* was sought from the Trial Division, and it was not seriously considered by the court as a possible remedy, let alone granted.[310] Indeed, it may well be that for all practical purposes prohibition and injunctions have taken over the role of this remedy.[311]

7. The Trial Division as a Stayer of Orders or Proceedings Pending the Determination of Section 28 Applications

Attempts have been made to use prohibition and injunctions as a method of staying proceedings or the execution of orders pending the outcome of section 28 applications. However, neither has been evoked successfully. The court in one case acknowledged the possibility of relief being available but not simply as a stay but on the substantive basis of a lack of jurisdiction which, there, had not been established.[312] In another case, however, the court refused to go even this far stating that the application for an interlocutory injunction to stay matters could not proceed because, by section 28(3), the matter was within the exclusive jurisdiction of the Court of Appeal given that a decision or order subject to section 28(1) scrutiny was involved.[313]

There are in fact no Rules authorizing either the Trial Division or the Court of Appeal to stay proceedings pending judicial review save that Rule 1909 opens up a possibility in some situations. This Rule allows the court to stay the execution of a judgment and, under the *Canada Labour Code*, orders of the Canada Labour Relations Board

can be given the effect of judgments by filing them in the Federal Court.[314] Once this is done, the possibility of a stay under Rule 1909, pending section 28 review, is opened up and this much has been acknowledged by the Federal Court.[315] However, the application must be made, not to the Court of Appeal, but to the Trial Division since the orders become Trial Division judgments.[316]

E. APPELLATE JURISDICTION OF THE TRIAL DIVISION AND THE COURT OF APPEAL

1. Court of Appeal

The interrelationship between review under section 28 of the Act and statutory rights of appeal, and, particularly the effects of section 29, have already been discussed and will not be canvassed again here.

The appellate jurisdiction of the Federal Court of Appeal is quite extensive[317] and, moreover, by virtue of section 30(1), is available in all cases where a right of appeal to the Federal Court is created by statute, except in matters of Income Tax, Estate Tax or Citizenship.[318] This means that, unless the statute expressly specifies that the right of appeal is to the Trial Division, the Court of Appeal possesses appellate jurisdiction, subject to any delegation of a particular class of appeals that might be made by the Rules.[319]

As well as actually hearing appeals under various statutes, the Court of Appeal is also involved in hearing applications for leave to appeal and applications for leave to extend the time for making an appeal under a statute.[320]

The experience of the Court of Appeal with each of these three jurisdictions is described by Lemieux and Vallières.[321] There are one or two issues where the approach of the court parallels the approach adopted in section 28 matters. For example, the question of what constitutes a "decision" for the purposes of the availability of a statutory right of appeal will seemingly be decided in the same way as the question of what constitutes a "decision" for the purposes of section 28.[322] Similarly, when it is a question of seeking leave to

extend the time in which to appeal, the principles employed are identical with those used in applications for leave to extend the time for making a section 28 application. None of this is surprising.[323] It is also worthy of note that, as with judicial review applications under section 28, the Court of Appeal has authority by virtue of section 52(*c*)(ii) to refer matters back to the statutory authority with directions. This power has been exercised in cases where error has been found but where the court is not sure whether the decision would have been different if no error of law had been made.[324]

2. Trial Division

The Trial Division is given explicit appeal jurisdiction by way of trial *de novo* in matters of Income Tax, Estate Tax and Citizenship matters.[325] Also, by virtue of section 30(2), the Rules may provide for certain other classes of appeal to be dealt with by the Trial Division,[326] even though by virtue of section 30(1), the court is defined generally for appeal purposes as the Court of Appeal. The other source of Trial Division appellate jurisdiction may be in relation to those statutes where the Trial Division is explicitly made the division of the court in which appeals are launched.[327] As well, according to Pierre Issalys and Gaylord Watkins, the Unemployment Insurance Commission is extremely significant from a workload standpoint,[328] since all Trial Division judges have been designated umpires for the purposes of appeals under the *Unemployment Insurance Act*.[329] According to Issalys and Watkins, this accounts for a fifth of all the Trial Division judges' time and would be sufficient to keep three judges going full time.

F. SUBSTANTIVE LAW OF JUDICIAL REVIEW IN THE FEDERAL COURT

1. Introduction

It is much more difficult to assess the way in which the Federal Court has applied the substantive law of judicial review than to assess

the workability from a remedial standpoint of the judicial review provisions of the Act and the court's approach to those provisions. There are basically two reasons for this. First, any commentator's perception of how a court has performed in developing the common law of judicial review will be conditioned to a certain extent by his notions of the proper role of the courts in relation to the administrative process. In other words, for some, an interventionist court may be a good thing as it ensures that the courts are being vigilant in protecting individual rights, liberties and interests against a burgeoning bureaucracy. For others, an interventionist court means simply too much interference in the affairs of allegedly expert statutory decision-makers by an inexpert court.[330] Secondly, any assessment becomes extremely difficult because of the enormous task involved in understanding all the various decision-making processes that are potentially the subject of review under the Act. Absent an in-depth understanding of all federal enabling statutes, any assessment becomes very impressionistic.

There is another factor involved here. Given the range of processes that are potentially subject to judicial scrutiny, the performance of the court may vary considerably and be classifiable as good in relation to certain tribunals and bad in relation to others. Therefore a general judgment may be impossible.

There is perhaps, a final difficulty at least in relation to the Trial Division. While it may be possible to discern a certain corporate identity in the Court of Appeal, with its limited number of judges[331] always sitting as a bench of three,[332] that is clearly not the case in relation to the Trial Division, so to a certain extent, a proper assessment of that division's work involves looking at the judges individually[333] first and then, perhaps, judging the functioning of the Court on the basis of one's assessment of a majority of the judges.

To date, there has been very limited analysis of the caseload of the Federal Court, and, an extensive survey of the substantive work of the court is beyond the scope of this paper. However, by way of introduction it should be pointed out that, in many senses, the court's administrative law docket is staggering. Indeed, so heavy is the volume of administrative law cases that it is not at all surprising to find at least some quite cryptic judgments.

For these reasons, and also because the remedies can be dealt with, at least in this context, as a separate problem, this paper does not explore comprehensively the performance of the court in the field

of substantive law of judicial review. However, certain of the areas of substantial judicial review will be discussed because they relate peculiarly to the present remedial structure under sections 18 and 28 and to the proposals which will be made for a change. In particular, this paper will focus upon the ability of the Trial Division to review for abuse of discretion, the scope of review for error of fact under section 28(1)(*c*) and the application by the Court of Appeal of the principles of natural justice to federal statutory authorities.

2. Review for Abuse of Discretion by the Trial Division

When the Federal Court was established, it seemed likely that the Trial Division would become involved in attempting to review the purely administrative discretions of Ministers of the Crown and high departmental officials.[334] These were matters not caught by section 28(3) which excludes Trial Division jurisdiction where the Court of Appeal has original review authority. Yet, while this ground of judicial review continues to flourish in the United Kingdom[335] and also in such countries as New Zealand,[336] there is little or no evidence of a great surge of litigation in this area in Canada. Perhaps there are two explanations for this — first, the Canadian jurisprudence still seems to be heavily weighted against the ability of the courts to significantly review Ministerial or other purely administrative discretions[337] and, secondly, many of the Ministerial and departmental functions of countries such as the United Kingdom and New Zealand are carried out in Canada by major regulatory agencies. As a result of these and perhaps other factors, the Trial Division has not been asked to take original jurisdiction in what can be very important and politically sensitive areas. Nevertheless, the situation may not continue. It would be quite surprising if Canadian lawyers were both unaware of and unwilling to pursue the avenues of review for abuse of discretion on the part of Ministers of the Crown suggested by English decisions of the last two years. There have, moreover, been successful attempts to review discretionary decisions made by Ministers of the Crown at the Court of Appeal level,[338] though principally on the basis of breach of the natural justice rules. These will be dealt with in the discussion of the performance of the Court of Appeal in the area of natural justice.

3. Section 28(1)(*b*) and (*c*)

At the time of the establishing of the Federal Court some concern was expressed about the seeming extension of the scope of common law judicial review brought about by sections 28(1)(*b*) and (*c*) of the Act.[339] In particular, it seemed that the potential scope for judicial intervention provided by section 28(1)(*c*) might well lead to a considerable amount of inappropriate judicial review should the court show great willingness to scrutinize the factual findings of expert administrative tribunals. So far, this has not been borne out by the operations of the court. Indeed, there does not appear to be a single case in which the formula of "an erroneous finding of fact made in a perverse or capricious manner or without regard for the material" has been the foundation of a successful judicial review application.[340] There have been two decisions where the Court of Appeal reviewed because there was no evidence to support the decision in question.[341] This might be seen as a use of section 28(1)(*c*)[342] but more recently the Federal Court of Appeal in *Mojica v. Minister of Manpower and Immigration*,[343] has indicated that it sees section 28(1)(*c*) as being only a more specific example of an error of law, the basis set forth in section 28(1)(*b*).[344] This would seem to indicate that the court does not see section 28(1)(*c*) as providing an opportunity for substituting its views for those of the decision-maker under review on factual matters within the decision-maker's jurisdiction or peculiar area of competence.[345]

There have of course, been a number of cases where section 28(1)(*b*) has been used as the basis of review,[346] but it seems that removing the common law requirement that the error of law appear on the face of the record has not led to a greater willingness to find errors of law but rather has simply removed a needless and unjustifiable technicality from the law.

It should, however, be observed that fears which are expressed about the potential of section 28(1)(*c*) and relief about its limited or, perhaps more accurately, non-use, stem from a sense that courts should not generally become involved in reviewing the factual findings on the merits by statutory decision-makers. However, others have clearly different views on the failure of the court to use section 28(1)(*c*). For example, Gordon Henderson, Q.C. recently criticized the Federal Court of Appeal for treating section 28(1)(*c*) as if it were just another species of error of law and virtually writing it out of the Act.[347] Basically, he sees the intentions of Parliament for extended judicial review thwarted by the actions of the court in interpreting the provision.

4. The Federal Court of Appeal and Natural Justice

The courts' basic task in dealing with allegations of breach of the rules of natural justice is to strike a balance between the claims of those affected for procedural fairness and the interests of statutory decision-makers in not being forced into the mold of inappropriate court-like procedures, with the resulting cost of inefficient decision-making. Where that balance is struck will, to a large extent, be conditioned by the respective values that the court places on each of these factors and, indeed, any assessment of a court's performance in this area will, by the same token, be influenced by the critic's own perception of those values. Against this backdrop, it seems fair to say that the Federal Court of Appeal has by and large performed quite adequately in the area of natural justice.

Bias need not be dwelt upon as there have been few cases, though one is forced to acknowledge that here the Court of Appeal has suffered two embarrassing reverses at the hands of the Supreme Court of Canada.[348] Interestingly enough, one was after a finding of a reasonable apprehension of bias[349] and the other after a finding of no such apprehension[350] so arguably little is to be learned from those cases at least in terms of the readiness of the court to find bias. Moreover, mention should also be made of *Burnbrae Farms Ltd. v. Canadian Egg Marketing Agency*,[351] where the court in a sensible and uncontroversial judgment held that the prior involvement of agency members in the decision to have a "show cause" hearing did not disqualify them from sitting on that hearing.[352]

The cases involving judicial implication of the rules of natural justice have already been discussed in the context of the section 28(1) requirement that the decision making process contain some judicial or quasi-judicial element. Therefore, they will not be canvassed again here. Rather, the present discussion will assume the validity of the finding that there was need for some kind of procedural protection and will concentrate on the aspect of content, *i.e.*, how great the court found that need to be.

At the outset, it is pertinent to note that present statutes and regulations generally attempt to spell out the procedural requirements in some detail when a hearing is required by statute. This attention to procedural detail in drafting means of course that, at least in certain areas, the opportunities for arguing for further implied procedural

protections will be limited. Presumably, it will also mean a greater willingness on the part of courts to hold that the procedures laid down are intended as a complete legislative code, leaving no room for the implication of further procedural protections on a common law basis.[353] In so far as this reflects legislative intention, as it does in many cases, it is a legitimate approach and has been applied on two or three occasions by the Federal Court of Appeal.[354]

However, if there has been one area more than any other where the Federal Court has been involved in controversy over natural justice requirements, it has been with respect to the confidentiality of materials and, in a series of decisions, the court has indicated an unwillingness to accept the decision-maker's claim that he should not have to provide the affected person with copies of all pertinent material or even with any information as to what that material contains. *Blais v. Basford*[355] and *Blais v. Andras*,[356] involved the withholding by the Minister of Consumer and Corporate Affairs of reports by the Superintendent of Bankruptcy on which the Minister based his decision to place restrictions on the applicant's trustee in bankruptcy licence. In *Lazarov v. Secretary of State of Canada*,[357] the court intervened when the Minister withheld even the gist of security reports which formed the basis of a denial of citizenship. This conflicted with an Ontario High Court decision of not two years' vintage[358] and, as already noted,[359] is difficult to reconcile with *Prata v. Minister of Manpower and Immigration*,[360] where the Supreme Court of Canada upheld the refusal to reveal the content of similar reports by the Minister in an immigration situation.[361] In *Magnasonic Ltd. v. Anti-dumping Tribunal*,[362] intervention occurred where the Tribunal gathered material in the absence of the parties and failed to reveal it to the affected party.

In each of these cases the argument was made that the information was not disclosed either because of the need to protect the identity of sources in (the *Blais* and *Lazarov* situations) or to protect the competitive position of Canadian companies (the *Anti-dumping* case). In rejecting these arguments, the Court of Appeal, to a degree, favoured the rights of individuals affected over the interests of the statutory decision-maker in the efficiency of the particular process. Indeed, in terms of procedural requirements being imposed on Ministers of the Crown, *Blais* and *Lazarov* can be seen as fairly radical steps.

Nevertheless, in all three cases, the court suggested a balanced solution. Perhaps, the requirements could be met in *Blais* and *Lazarov*

and confidential sources could be protected by simply giving the applicant for relief summaries of the material or the gist of the information contained therein.[363] In the *Anti-dumping* case, the suggestion was that the hearings be held *in camera* so that the whole world would not find out about the information and, if necessary, business rivals and competitors could be excluded and provided with a summary afterwards.[364] To be sure, this approach involves certain difficulties. What if to give even a summary of certain information is to reveal the source? Who is to stop the parties from taking competitive advantage of the information revealed when they have not been excluded?[365] Yet, given the serious interests that were involved and, having regard to those interests, the court displayed what is very arguably a legitimate concern for individual rights.

There has also been some concern expressed about the performance of the Federal Court of Appeal in relation to hiring, firing and promotion procedures in the federal public service.[366] The complaints are concerned with substantial interference in the merits of that decision-making process. Yet, if one looks at the series of decisions of the Federal Court of Appeal concerning the adequacy of procedures in those public service processes, the general impression is one of great sensitivity in the court to the needs of that process.[367] On at least two occasions, the court has emphasized that bodies exercising functions within that process are not courts of law and do not have to function as if they were.[368] The court has also rejected arguments that the three-person Public Service Commission has to personally run every competition for promotion and positions in the federal public service[369] and has also accepted that members of the Public Service are not disqualified from membership on appeal boards established by the Commission.[370] In *Blagdon v. Public Service Commission*, it was emphasized that Public Service Commission Selection Boards or Rating Boards are in no sense judicial or quasi-judicial bodies. Rather, they perform a purely administrative task.[371]

It is also clear that the court is not prepared to push the duty to reveal confidential information too far. In *Seafarers International Union of Canada v. Canadian National Railway*,[372] the court held last year that the C.T.C. did not have to reveal all information to objecting parties at a hearing to determine whether or not C.N. would be allowed to acquire an interest in two transportation companies. Le Dain J., in the course of his judgment, noted the difference in the status of the complainants in this case and *Magnasonic*.[373] In *Magnasonic*, the information was being withheld from the target of the

hearing. This was different, according to Le Dain J., from the present situation which involved the making of objections, though he noted that the duty to reveal would be dictated even in this class of case by the nature of the objection and the issues raised.[374]

The flexibility in approach towards the whole question of the details of procedural fairness in particular cases also emerges from a subsequent Court of Appeal decision in *In re C.R.T.C. and in re London Cable TV Ltd.*[375] There, Jackett C.J., delivering the judgment of the court, set aside a decision of the C.R.T.C. raising the fees that a cable television company was allowed to charge its customers. This was done on the basis of a failure to allow the objectors to see financial statements at the "public hearing".[376] However, the court at the same time rejected arguments of invalidity based on the failure of the Commission to allow access to staff studies and on the Commission's refusal of the right to cross-examine witnesses.[377] Presumably, the contrast between the staff studies and the financial statements rested as far as the Chief Justice was concerned, in a sense that, in this kind of hearing, the provision of financial information was an absolute minimum ("the fundamental basic facts") without which the right to object and be heard, confirmed by the statute, made absolutely no sense. However, beyond that he seems to have seen the necessity for the scope of the hearing to be confined within reasonable bounds.

This has not purported to be an exhaustive survey of all of the natural justice cases involving the Federal Court of Appeal.[378] However, the sample noted does demonstrate that the court has at least been asking the right questions in these cases (Where is the balance to be struck?) even if the final answers are not universally accepted.

V. Perceived Defects and Alternative Solutions

A. IS THE COURT NEEDED?

At the outset, it is important to ask whether the transfer of judicial review jurisdiction with respect to federal statutory authorities from the provincial superior courts to the Federal Court has been worth the effort. This involves a number of factors. Were the provincial superior courts doing such a poor job in reviewing federal statutory authorities anyway? Has the Federal Court improved the quality of judicial review? Was there a need for another court in terms of workload? Is it possible to work a dual system of judicial review in Canada without too much litigation being generated regarding which system has jurisdiction, when those systems are by and large intended to be mutually exclusive?

In most respects, the arguments for a federal court reviewing federal statutory authorities seem clinching. First, there has always been a certain amount of statutory appeal work handled by a federal court in this country. With the apparent increase in the incidence of statutory appeal provisions in federal statutes, it makes considerable sense to have the same court which deals with the statutory appeals also handling judicial review applications, given a certain overlap between the issues that arise in appeal and review. Moreover, a combination of the two may have a tendency to increase the expertise of the court in dealing with the process, though some perhaps would argue that this is not necessarily desirable, relying on the old proverb about familiarity.

Secondly, if expertise and familiarity with the federal administrative process are considered to be appropriate ends to be sought in reviewing courts, that objective presumably will have a greater chance of success if all judicial review work is in the hands of one court as opposed to ten provincial superior courts. This is particularly so as there may be different reviewing needs in relation to federal statutory authorities than in relation to provincial authorities, the staple diet of provincial superior courts. This proposition is difficult to support empirically but at least it can be asserted that, given the relatively infrequent exposure of provincial superior courts outside Ontario and Quebec to the process of the federal administration in review proceedings prior to 1971, expertise and familiarity were never likely to come about in those courts. The work was simply too random and haphazard.

Thirdly, while statistics for the years before 1971 are not available, it is apparent that, even since the creation of the Federal Court, there has been a tremendous increase in the number of judicial review applications involving federal administrative authorities.[379] It is doubtful whether the courts of Ontario or Quebec could have handled this substantial increase given current caseloads. Indeed, one suspects that the Federal Court is beginning to have considerable difficulty in handling its own administrative law docket, particularly considering section 28(5)'s spur to speedy determination of applications and the Court of Appeal's seeming determination to follow that admonition as closely as possible. Of course it might be argued that, without the creation of the court's administrative law jurisdiction, there would not have been the present number of cases. Indeed, the creation of the court might be seen as a major factor in clogging up the federal administrative process by exposing that process to the potential of so much judicial scrutiny. Nevertheless, the last five years or so seem to have witnessed an incredible upsurge in judicial review applications across Canada and it would be false to brand the creation of the Federal Court with responsibility for the full extent of that increase in relation to federal statutory authorities.

Certainly, there have been difficulties with the existence of the almost mutually exclusive dual systems of judicial review in the sense that the legislation establishing the Federal Court has given rise to interpretative problems of when the provincial superior courts have been excluded. Which bodies or persons are included within the definition of "federal board, commission or other tribunal" in section 2(*g*) of the Act and therefore amenable to Federal Court review authority? What effect does the continued existence of *habeas corpus*

as a remedy in the provincial superior courts in relation to federal administrative authorities, have on the review jurisdiction of the Federal Court? Can *certiorari* be awarded in aid of it as before? Can the Federal Court issue alternative remedies in situations where *habeas corpus* might also be appropriate? Such difficulties are, of course, not completely avoidable. Nevertheless, some matters have been cleared up satisfactorily already. Others undoubtedly remain, particularly in relation to section 2(*g*). However, given some legislative clarification, these problems may perhaps be reduced to a minimum and, with the other arguments for a federal court in this field, that might not be too great a price to pay.

This study has barely touched the surface of the issue of whether the substantive law of judicial review has been developed well or poorly by the Federal Court since its creation. Moreover, no attempt has been made at comparing the performance of the Federal Court in judicial review matters with that of the various provincial courts in relation to federal statutory authorities prior to 1971. Nevertheless, simply on an impressionistic basis, there would seem to be no clearly demonstrable case that the Federal Court is inferior to the various provincial courts in the area of judicial review of administrative action. Indeed, given the appointment of judges with considerable administrative law backgrounds, it is quite possible that the court is significantly better in substantive judicial review areas than most, if not all of the provincial superior courts.

A lot of what has just been said is not empirically supported. However, given the factors of the need for expertise and the quantity of litigation being generated, a case is far from being made out for the removal of the court's judicial review jurisdiction and its return to the provincial superior courts.

B. THE SUBSTANTIVE GROUNDS OF JUDICIAL REVIEW

As just mentioned, the study has not looked in any depth at the performance of the Federal Court in the area of the substantive law of judicial review. This requires further extensive work. Suffice it to say that the new grounds for judicial review spelled out in sections 28(1)(*b*) and (*c*) do not appear to have caused a radical alteration in

the principles of common law judicial review. In particular, section 28(1)(*c*), has not produced any great movement by the Court of Appeal to become involved in reconsideration of the merits of decisions coming up for review. Rather, in "redefining" the provision so as to make it a specific example of error of law, the court has virtually ensured an identity between the usually accepted common law grounds of judicial review and the statutory grounds provided in section 28. At the Court of Appeal level, there has been some recognition of the new concept of a duty to act fairly with procedural content applicable to all statutory authorities, be they judicial, quasi-judicial or administrative. This has been developed in the last ten years by the English courts but so far there is little or no suggestion that the Trial Division, where such arguments have potentially more impact,[380] is prepared to recognize this new phenomenon.

Basically, the court has been very traditional in the way it has outlined the principles of judicial review. No great development in the substantive law of judicial review can be attributed to the court in the six years of its existence, except perhaps the court's approach to claims of confidentiality by federal statutory authorities. As a result, there seems to be no immediate need to redefine the grounds of judicial review in section 28 in order to correct aberrations. There really have been none. Indeed, perhaps there should have been, or perhaps, at least, section 28(1)(*c*) deserved a better fate. There may, however, be other reasons for a redefinition of the grounds of judicial review and these will be discussed shortly.

C. THE PROCEDURES FOR JUDICIAL REVIEW

Though the case for the continuation of Federal Court jurisdiction over judicial review of federal statutory authorities is strong, there is an even stronger case for attempting to redefine that jurisdiction. This argument is to a large extent borne out by the considerable quantity of litigation which has raised questions of interpretation since the court came into existence on June 1, 1971.

At this juncture, it is appropriate simply to highlight those difficulties again. As predicted at the time of the court's creation,

there have been considerable problems with the division of original jurisdiction between the Trial Division and the Court of Appeal. Moreover, these difficulties have come not only from the expected source in section 28 ("of an administrative nature not required by law to be made on a judicial or quasi-judicial basis") but also from the words "decision or order". Not only has the issue of what constitutes a "decision or order" produced much litigation and continued confusion but also there is something strange about a regime where one court has original review jurisdiction before a decision or order is made and another court has jurisdiction afterwards.

Equally, if not more productive of difficulty, has been the question whether the statutory authority under challenge is a "federal board, commission or other tribunal" and thereby amenable to the review jurisdiction of the court. To these problems of definition must also be added the fact that the Trial Division still has to cope with the old forms of judicial review despite the fact that the Court of Appeal functions with a new and therefore less troublesome remedy. As well, both divisions have been left to deal with some of the perennial problems of remedial judicial review — *e.g.* the availability of relief with respect to non-final decision-makers and the issue of the standing of individuals to challenge administrative action in the court, though there has been a somewhat unsatisfactory attempt at codifying or reformulating the principles relating to standing in section 28(2) of the Act.

What are the possible responses to these major problems? For example, could the problems of the division of jurisdiction be circumvented by a variation of the form of words used? Could the difficulties created by the words "decision or order" similarly be reduced by a clear statutory definition? Neither of these solutions seems particularly feasible. First, the administrative/judicial dichotomy on which the division of review authority is based is so fraught with confusion that it can have no continuing claim for preservation in either the present or modified form. Further, while the present language ensures that the Court of Appeal has original review jurisdiction over all federal administrative tribunals, it does not necessarily mean original Court of Appeal review jurisdiction over all the most important federal statutory authorities. In particular, it does not apply to many exercises of statutory authority by Ministers of the Crown where any attempts at review must presently take place at the Trial Division level. On the question of "decision or order", it has been argued that Trial Division scrutiny of interlocutory matters and Court of Appeal scrutiny of the final

decision or order is quite desirable as a method of dividing jurisdiction.[381] However, irrespective of the merits of that argument, the judicial interpretation of these two words is unclear. Furthermore, some interlocutory matters are of great significance, particularly determination of jurisdictional fact questions.

All of this suggests the need for a fundamental reordering of the judicial review jurisdiction of the court. There would seem to be three possible alternatives.

1. Give all judicial review matters to the Court of Appeal initially or, perhaps more desirably, to a division of the Federal Court specially set up to deal with judicial review and statutory appeal matters after the style of Ontario's Divisional Court.
2. Give all judicial review matters to the Trial Division initially, with perhaps the possibility of referring difficult or important cases immediately to the Court of Appeal.
3. Attempt a division of original jurisdiction between the Trial Division and the Court of Appeal based not as at present but upon a list of functionaries contained in a schedule to the statute, *e.g.*, major federal administrative tribunals, Ministers of the Crown, the Governor in Council, and perhaps certain senior governmental officials being assigned to the Court of Appeal.

Each of these three alternatives dispenses with the distinction between judicial and administrative matters as the basis of jurisdiction, and, none of them divides jurisdiction on the basis of interlocutory and final matters. Of course, further variations are possible; for example, the idea of a special division of the court devoted to administrative law matters suggested in the first alternative could be developed in relation to the other two alternatives as well. Indeed, given the volume of the court's administrative law work, particularly in comparison with its other work,[382] there is no doubt that a separate division could be kept very busy and is perhaps more than justified in the interests of expertise. The one essential proviso in such a scheme should be that judges be specially designated for that division and not subject to rotation as has happened in both Ontario[383] and New Zealand,[384] with unsatisfactory results.

Before considering these alternatives in more detail, the point should also be made that, whichever alternative is adopted, the section dealing with the interrelationship between statutory appeal

and judicial review should be redrafted. The Chief Justice has suggested that there should be only one route for each federal statutory decision-maker to the Federal Court but that could be either by way of statutory appeal or judicial review depending on the nature of the tribunal.[385] That approach is highly desirable. Once a right of appeal to the court has been statutorily designated from a particular decision, that should be the extent of recourse to the courts from that decision except, of course, for the ability of the court to prohibit or enjoin a wrongful assumption of jurisdiction. Obviously though, care will be required in the formulation of statutory appeal rights and, in the federal context, such an approach would require a detailed consideration of the appropriateness of existing statutory appeal rights. One suggestion of the Chief Justice's that does not commend itself though is the idea that all statutory appeals should be general and unrestricted if there were no judicial review alternative. For example, there might very well be reasons why the only desirable recourse from decisions of a particular authority should be an appeal on questions of jurisdiction or, more likely, an appeal on questions of law and jurisdiction.

Of the three alternatives identified, the most attractive is the second. Given the mass of judicial review matters and statutory appeals presently coming before the Federal Court, not to mention the relative triviality of many of them, the use of a three-man appeal court to deal with all judicial review matters and statutory appeals, as under the first alternative, would be a waste of resources. On the other hand, when the *Federal Court Act* was introduced, it seemed to be accepted that, at least in relation to some multi-member, important federal tribunals, judicial scrutiny by a single trial court judge was not all that desirable.[386] This, of course, suggests the third alternative with a continuation of the division of original jurisdiction between the two courts, though on a quite different basis. However, single judge original review of statutory authorities, the case in all the provinces except Ontario,[387] does not seem to have generated any great controversy and would seem quite adequate at the federal level, particularly if accompanied by the creation of an administrative law division of the Federal Court. Moreoever, acceptance of the third alternative would involve a perpetuation of many of the problems of the present situation. Not only would there be serious difficulties in agreeing upon the list of authorities to be governed by the Court of Appeal but also such a regime would ensure that the high cost involved in having a peripatetic Court of Appeal would continue and perhaps increase. Furthermore, it would mean that the three-man Court of Appeal would continue to deal with many routine or trivial

matters. For example, unless the Immigration Appeal Board was excluded, the Court of Appeal would still have to confront the mass of matters coming from that body, most of which raise no substantive questions of general importance.

Of course, at times, the matters raised in a judicial review application will be so significant that they are obviously destined for the Court of Appeal and, possibly, the Supreme Court of Canada. In such instances, the need for expeditious handling of judicial review matters dictates that it be possible to have the matter dealt with initially at the Court of Appeal level. Accordingly, these interests could be protected by conferring authority on members of the Trial Division and on the Chief Justice of the court to refer the case directly to the Court of Appeal.

In setting up a new remedial regime with the Trial Division having all original review jurisdiction there are three basic alternatives. First, retain the present section 18 with all the old remedies. Given the difficulties that have already arisen with these remedies in the Trial Division this approach would be unsatisfactory. The second alternative would be to have a new remedy and to spell out what it can do and the possible grounds for its availability quite explicitly, at the same time making clear that these grounds are not necessarily available in relation to all functions coming under the scrutiny of the court (*e.g.* a failure to hold a hearing would not always be a ground of review). This has the advantage of dispensing completely with the old forms of remedy and allowing for a new start to be made in this area of administrative law remedies. This was basically the approach advocated by the Kerr[388] and Ellicott Reports[389] at the federal level in Australia. There seems great merit in it, provided there can be agreement on the grounds to be specified and, possibly, provided the section can be drafted in such a way as to allow for development of new grounds on a common law basis.

If this is not acceptable, a compromise third approach — one recommended for England and Wales[390] and accepted in Ontario,[391] British Columbia[392] and New Zealand[393] — is simply to establish the new remedy by reference to the old forms of judicial review. This has the disadvantage of forcing litigants to rely on old law. Nevertheless, given that the principal objections to the old forms of relief were not so much the grounds for review as the procedures surrounding their availability, difficulties of combining them in the one set of proceedings and doubts about the situations when there were genuine alternatives, there may not be all that much objection to such a course

of action. It also has the merit of being the way chosen by two Canadian jurisdictions already and, presumably, there is some merit in uniformity.

A statutory statement of the common law grounds of judicial review does not present great difficulty. Indeed, the present section 28(1) of the Act is a good starting point, providing as it does for review for jurisdictional error, including breach of the rules of natural justice, error of law and certain errors of fact. In fact, this virtually reflects the present scope of common law review with extensions in section 28(1)(*b*) and (*c*) in the areas of error of law and error of fact. Nevertheless, there may be some advantage in being more explicit to prevent disputes as to the scope of the section. In fact, the grounds suggested in the Kerr Report in Australia are more detailed than those in section 28(1).[394] It must also be remembered that section 28(1) deals with review after a "decision or order" has been made, and this may have some effect on the way the grounds should be stated. More specifically, it may dictate the need for the inclusion, for example, of a wrongful failure to exercise jurisdiction as a review ground.

In this respect, the following grounds which by and large reflect those recommended by Kerr, are suggested:[395]

(a) an absence of jurisdiction (including lack of authority by virtue of *The British North America Act, 1867* or the *Canadian Bill of Rights*)

(b) an excess of jurisdiction

(c) a wrongful refusal to exercise jurisdiction or perform a legal duty

(d) abuse of discretion

(e) bad faith (including fraud or misconduct)

(f) an *ultra vires* exercise of power

(g) breach of the rules of natural justice (including bias)

(h) a failure to follow statutory procedural requirements

(i) procedural unfairness

(j) an error of law

(k) an absence of any evidence to support a decision or order.

Basically, these grounds amount to no more than a more detailed codification of the common law of judicial review as contained in the

present section 28(1) and, for the most part, they would not seem to be contentious. There are, of course, obvious overlaps in the list such as, for example, between (a) an absence of jurisdiction and (b) an *ultra vires* exercise of power. However, this simply reflects that the courts have in the past used both kinds of language as the basis for review of essentially the same kind of error, generally talking about an absence of jurisdiction in relation to tribunals and an *ultra vires* exercise of power in relation to subordinate legislative authorities, both of which would be covered by the new review section.

Three grounds do deserve specific comment however. Procedural unfairness as a ground of review separate from breach of the rules of natural justice has not, as seen already, been generally accepted as a basis for judicial review in Canada though there has been some tentative recognition of this largely English development. The significant advantage of the procedural unfairness doctrine is that it enables the courts to break away in large measure from the shackles of the judicial/administrative dichotomy in deciding whether to imply further procedural protections into a statute and, given that this is a desirable development, there is perhaps some merit in specifically mentioning it as a potential basis for judicial scrutiny in the new section setting out the grounds of review.

Also meriting comment are (j), error of law and (k), no evidence. At common law, error of law is probably only a ground of review if it appears on the face of the record of a tribunal obliged to act in a judicial or a quasi-judicial manner. In formulating the new section the potential for the making of such arguments should perhaps be extended to all situations, given the present policy of section 28(1)(*b*) to make this ground of review available irrespective of whether the error appears on the face of the record or not. With "no evidence", this perhaps should be stated in the language of the common law of judicial review, rather than the present language of section 28(1)(*c*). There are basically two reasons for this. The language of section 28(1)(*c*) is unusual, at least in terms of the present common law, and, as discussed earlier, this has led the courts to give it a very restrictive interpretation. Against this background, a return to the familiar common law language of "no evidence" has merit.

Worth repeating is the caution that the section should be drafted in such a way as to make clear that all of these grounds of review may not be applicable to all federal statutory decision-makers. Some of the grounds are, of course, universal, *e.g.* jurisdictional error. However, at common law the rules of natural justice apply to a limited range of

decision-makers and accordingly the new remedy should preserve the ability of the court to decide whether natural justice applies to a particular decision or not. On the other hand, if it is intended to extend the availability of review for error of law to all statutory authorities, that should be stated explicitly.

Coupled with the codification should also be a statement of what the Federal Court may do if one of the grounds for judicial review is established. The present section 28(1) (and section 52) only speak to a situation where the review proceedings take place after the decision or order has been made. Accordingly, those two sections will not provide a sufficient basis of remedial alternatives and the following possibilities all seem necessary:[396]

(a) a power to set aside

(b) a power to refer back for reconsideration

(c) a power to prevent an authority from proceeding further

(d) a power to compel the making of a decision or order or to perform a legal duty, including the following of correct procedures in making a decision

(e) a power to issue a declaration of right, including a declaration with respect to the possibilities in (a) to (d) and referrable to all the codified grounds of review.

Once again this is no more than a statement of the remedial possibilities under the present common law remedies, except that technicalities relating to the particular remedies, such as *certiorari* and prohibition, have been eliminated, and declaratory relief has been clarified so as to make it apply to all grounds of review. This also should perhaps be linked with a provision to the effect that declaratory relief may be awarded against non-suable entities, thus eliminating an unjustified complication in the present remedial fabric.

However, looking at the problems already encountered with the Ontario Act and its use of the terms "statutory power" and "statutory power of decision" as the basis for review,[397] there would seem to be strong reason for avoiding the use of such a formula in any federal statute. In Ontario and New Zealand, these formulations have had the effect of introducing some of the difficulties associated with the term "decision or order" in section 28(1) of the *Federal Court Act*. In particular, this type of formulation can lead to problems in the much vexed area of non-final, recommendatory and reporting functions.[398]

In fact, the whole matter of non-final recommendatory and reporting functions, including inquiries under the *Inquiries Act*, should be dealt with specifically in any new statutory regime to prevent further remedial difficulties arising in this area. This would involve no more than a provision that the remedy or remedies are available with respect to such functions, and if there continues to be a split jurisdiction, stating in the schedule to the Act which of the divisions will be responsible for review proceedings.

If the old remedies are made the basis of the new simplified remedy, it may be necessary to spell out any new or doubtful grounds of review explicitly in the statute. This has been done in British Columbia[399] and Ontario Acts[400] in relation to error of law and factual error, the present preserve of section 28(1)(*b*) and (*c*). The ability of the court to issue an order quashing or setting aside the decision in question in place of a declaration has also been made clear.[401] Furthermore, it seems that this kind of clarification need not, as in Ontario and British Columbia, be tied to any statutory form of words such as "statutory power or statutory power of decision".

Given the tremendous amount of judicial review generated at the federal level since the creation of the Federal Court, one possibility worth considering, whichever alternative is adopted, is to make the right to apply for judicial review depend upon leave being given by the court. The English Law Commission has recommended this for the new remedial regime in England and Wales. It has considerable potential as a method of eliminating frivolous or trivial actions at an early stage and could replace the present provisions of section 52(*a*) relating to the striking out of proceedings. Of course, if it is accepted that it is necessary to seek leave to bring an application for judicial review, there will need to be a reconsideration of the ten-day period for commencing proceedings presently found in section 28(2).

A related problem is the question of appeals to the Court of Appeal from the judgment of the Trial Division in judicial review matters. At present, by virtue of section 27(1), appeals from decisions of the Trial Division under section 18 are as of right. However, in the interests of ensuring that the Court of Appeal will deal only with significant cases and also that it will have adequate time for hearing argument, there seems a strong case for restricting that right of appeal and requiring leave, either of the trial judge or the Court of Appeal.

Further, as proposed in the English Law Commission's Report,[402] and accepted in Ontario[403] and British Columbia,[404] there

should be provision for interim relief pending the disposition of the application for the principal remedy, and this should specifically include the possibility of a stay of further action or proceedings until the principal issues are determined — in the discretion of the court, of course. It seems quite incongruous that, under the present regime, the possibility of a stay depends upon whether the order of the tribunal can be filed and enforced as an order of the court.

At present, under section 18 of the Act, there is a choice as to the way in which a litigant proceeds — by way of action or by the simplified motion or application procedure — except in the case of declaratory proceedings or proceedings against the Attorney General or the Crown. Accepting the general need for expedition and simplicity in such matters, it may be that all proceedings should be commenced by the simplified motion or application-type procedure in future, with the possibility of the court in its discretion ordering that the matter be dealt with as an action should this seem appropriate.[405] However, if the choice is to remain with the litigant, there would appear to be no valid reason for retaining the exceptions to that choice.

Standing raises difficult problems. There is much to be said for the courts' present flexible position on this question at common law, making it largely a matter of discretion contingent on a range of factors. As a result there may be no need to include any express provision though perhaps, given the doubts as to the extent of the application of the judgments in *Thorson*[406] and *McNeil*,[407] a provision which allows standing as of right to all persons directly affected or aggrieved plus a discretion in the court would be desirable.

Two difficult matters remain:

(a) the relationship of *habeas corpus* in the provincial superior courts to review under the *Federal Court Act*.

(b) the foundation of the court's jurisdiction in judicial review matters based on the definition of "federal board, commission or other tribunal" in section 2(*g*).

The reasons for the retention of *habeas corpus* at the provincial superior court level would appear to be its high constitutional and historical significance, coupled with the sense that it should be available from any superior court judge virtually at any time of the day or night. If this is the rationale, then there are no problems in accepting the present situation. However, if the person in custody wishes to secure different relief from the courts *e.g.* a declaratory

judgment or *mandamus*, then perhaps normal channels only should be available to him *viz.* the Federal Court route. There is, however, a strong argument for statutory reversal of the judgment of Ritchie J. in *Mitchell*.[408] The availability of *certiorari* in aid of *habeas corpus* from provincial superior courts in relation to federal statutory authorities should be confirmed by statute. There seemed to be no express intention on the part of the draftsmen of the *Federal Court Act* that the remedy of *habeas corpus* be reduced in effectiveness by the provisions of section 18 and, in so far as *certiorari* in aid has been considered an important procedural supplement to that writ, it should continue to be available.

Finally, there is the whole basis of the court's jurisdiction in judicial review matters — the definition in section 2(*g*) of the term "federal board, commission or other tribunal". John Evans has recently expressed the opinion that the numerous problems and litigation generated here are not so much problems of statutory drafting as they are inevitable problems of any system of dual jurisdiction[409] and, to a certain extent, this is valid. Professor Evans sees these problems as so important that they bring into question the whole existence of a general judicial review jurisdiction in the Federal Court. However, for reasons already given, that argument is not accepted here.

In fact, many of the grounds of concern with the present definition have now been identified reasonably clearly and, while litigation will not be excluded completely, a lot of those criticisms and difficulties could be removed simply by adding to the list of excluded authorities. Possible candidates for exclusion are (a) section 96 judges in all capacities, (b) all decision-makers under the *Criminal Code*, *Extradition Act*, and *Bail Reform Act* and, possibly, (c) Crown Corporations.

D. SUMMARY OF PRINCIPAL RECOMMENDATIONS

1. The *Federal Court Act* should be amended so as to do away with the present division of original jurisdiction in judicial review matters between the Trial Division and the Court of Appeal.

2. Instead, all judicial review matters should be dealt with initially by the Federal Court – Trial Division.

3. Where a statutory right of appeal is established from a particular decision, this should be the only method of challenging that decision; judicial review should be excluded as a possibility. However, this should only be done after a thorough survey and rationalization of existing statutory appeals from federal administrative authorities. The right to prohibit or enjoin a wrongful assumption of jurisdiction should, however, be maintained.

4. The section establishing the jurisdiction of the Trial Division should spell out the grounds on which relief can be sought, though possibly in such a way as to leave open the possibility for further developments in the common law and should make clear that not all of the grounds of review are necessarily available with respect to all federal authorities, this remaining a question for the judge.

5. In addition, the section establishing the Trial Division's jurisdiction should make explicit the nature of the relief which the court is empowered to grant.

6. Consideration should be given to making the right to seek judicial review dependent upon the granting of leave.

7. Members of the Trial Division and the Chief Justice of the Federal Court should be given authority to refer cases directly to the Court of Appeal in their discretion.

8. It should be made clear that the relief available from the Trial Division applies to non-final, recommendatory and advisory functions including inquiries under the *Inquiries Act*.

9. The standing requirements for seeking relief should be spelled out, though in such a way as to leave the court considerable flexibility to extend the right to seek relief beyond those directly affected or aggrieved.

10. The statute should provide for interim relief.

11. All proceedings should have to be commenced by a simplified application procedure unless leave is given to commence by way of action.

12. Consideration should be given to excluding from section 2(*g*), the subsection which defines the term "federal board, commission or other tribunal", all criminal matters including extradition; in

other respects the provision should remain as the basis for the court's review power under any revised Act.

13. Judgments of the Trial Division in judicial review matters should be appealable to the Court of Appeal only with leave of the trial judge or Court of Appeal.

14. The continued availability of *certiorari* in aid of *habeas corpus* from provincial superior courts should be established clearly.

15. Consideration should be given to establishing an administrative division of the Trial Division, responsible for all judicial review applications and most statutory appeals from administrative authorities.

E. CONCLUSION

The administrative law jurisdiction of the Federal Court is now, more than ever, a vital institution. Unfortunately, that jurisdiction and the manner of its creation have generated an incredible amount of litigation involving interpretative difficulties. To be sure, some litigation on such statutory regimes is inevitable. In the case of the *Federal Court Act*, the quantity of litigation has however indicated that something much more fundamental is involved than the teething difficulties of a new court with a new statutory jurisdiction. A fundamental recasting of that jurisdiction is vitally necessary and the alternatives identified will hopefully generate discussion and ultimately legislative action.

Endnotes

1. The Federal Court was established by the *Federal Court Act*, S.C. 1970-71-72, c. 1; R.S.C. 1970, 2nd Supp., c. 10.

2. In section 3, the Federal Court was expressed to be a *continuation* of the Exchequer Court of Canada, under the name of the Federal Court of Canada.

3. Generally, this review jurisdiction was exercised by the superior courts of Ontario, Ontario being the location of the head offices of most federal statutory decision-makers. However, just a year before the enactment of the *Federal Court Act*, the Supreme Court of Canada had upheld the right of all provincial superior courts to review federal statutory authorities in appropriate cases. See *Three Rivers Boatman Ltd. v. Conseil Canadien des relations ouvrières*, [1969] S.C.R. 607. This is discussed more fully in *The Federal Court Act: A Misguided Attempt at Administrative Law Reform?* (1973), 23 U.T.L.J. 14 at 22-25.

4. See Gordon F. Henderson, Q.C., *Federal Administrative Tribunals in Relation to the New Federal Court of Canada*, [1971] L.S.U.C. Special Lecture Series (*Administrative Practice and Procedure*) 55 at 58-59. The only assertion of inherent prerogative writ jurisdiction for the Exchequer Court of Canada would appear to have been the majority judgment of Robertson J.A. in *Nanaimo Community Hotel v. Board of Referees*, [1945] 3 D.L.R. 225 (B.C.C.A.), rightly considered an anomaly.

5. See Henderson, *id.* at 56-57, where the appeal jurisdiction of the Exchequer Court is discussed.

6. For example, prior to the Act, appeals from the Immigration Appeal Board went directly to the Supreme Court of Canada. (See R.S.C. 1970, c. I-3, s. 23). However, by virtue of Schedule B of the *Federal Court Act*, this provision was repealed and the Federal Court substituted for the Supreme Court of Canada.

7. See (1973), 23 U.T.L.J. 14 at 22-25.

8. Attempts to review federal statutory decision-makers were not all that common before the Act and, while the bulk of applications seemed to be made in the Ontario High Court (*supra*, note 3), the other provincial superior courts also had jurisdiction but one where expertise was almost impossible given the infrequency with which they were called upon to adjudicate such issues.

9. Provincial objections came later, particularly over the apparently exclusive competence of the Federal Court to adjudicate on constitutional questions involving federal statutory authorities. Noted by Dale

Gibson, Comment (1976), 54 Can. B. Rev. 372 at 375-76 and discussed *infra*.

10. See, particularly, G. V. V. Nicholls, Q.C., *Federal Proposals for Review of Tribunal Decisions* (1970), 18 Chitty's L.J. 254 (outlining his submissions to the Commons Standing Committee on Justice and Legal Affairs) and Henderson, *supra*, note 4. See also my article, *supra*, note 3.

11. See Nicholls, *id.* at 257; Henderson, *id.* at 66-67. See also N. M. Fera, *The Federal Court of Canada: A Critical Look at its Jurisdiction* (1973), 6 Ott. L.R. 99 at 106.

12. See Nicholls, *id.* at 257 and *ff.*; Henderson, *id.* at 68-75; Mullan, *supra*, note 3 at 25-33.

12a. See legislative history in Mullan, *id.*, at 27.

13. See Nicholls, *id.* at 256-257; Mullan *id.* at 33-36.

14. See Minutes of the Commons Standing Committee on Justice and Legal Affairs, Tuesday, May 26, 1970: 28th Parliament, 2nd Session, no. 31, at 13 and *ff.* Discussed Mullan, *id.* at 36-43.

15. See *Sadique v. Minister of Manpower and Immigration* [1974] 1 F.C. 719 (T.D.). Confirmed subsequently by the Supreme Court of Canada in *Mitchell v. The Queen*, [1976] 2 S.C.R. 570. However, at least four of the judges were of the view that the remedy of *certiorari* was no longer available in aid of *habeas corpus* in such cases. See the majority judgment of Ritchie J., (at 594-95) concurred in by Judson, Pigeon and Beetz JJ. The other majority judges (Martland J., with whom de Grandpré concurred) did not deal with this issue. See, however, the dissenting judgment of Laskin C.J. (with whom Dickson J. concurred) at 578-79. The other dissenting judge, Spence J., did not deal with the issue of *certiorari* in aid of *habeas corpus* either. See also the judgment of Osler J. in *Re Ostello and Solicitor-General of Canada* (1975), 9 O.R. (2d) 780 (H. C.), where a declaration of entitlement to *habeas corpus* was held not to be precluded by the *Federal Court Act's* section 18. However, *mandamus* was not awarded, this being the principal remedy sought.

Mitchell (or rather Ritchie J. in *Mitchell*) has been followed by Krever J. in *Re Pereira and Minister of Manpower and Immigration*, (1976), 14 O.R. (2d) 355 (Ont. H.C. and C.A.) at 366-71, *aff'd* but without decision on this point, *id.* at 381. See, however, *Ex parte Collins* , (1976), 30 C.C.C. (2d) 460 (Ont. H.C.) at 464 (*per* Henry J.). Here, *Mitchell* was held to be confined on this point to cases where the allegation was breach of the natural justice rules or conflict with the *Canadian Bill of Rights*, and not affecting issues of jurisdiction or failure to follow conditions precedent. (Relief was, however, denied and an appeal to the Court of Appeal was dismissed without reasons: *id.* at 460). See also *R. v. Anaskan*, (1977) O. R. Blue Pages 46 (Ont. C.A.), where the point was again raised but not decided. Frankly, this confusion merits legislative attention immediately rather than further costly litigation. For a witty comment on the Supreme Court of Canada judgment in *Mitchell*, see Gilles Pépin, *Quelques observations générales sur la question du caractère efficace ou illusoire du contrôle judiciaire de l'activité de l'administration* (1976), 36 R. du B. 453 at 489-94.

16. Seemingly, where the validity of Regulations promulgated by the Governor in Council is involved. See *Desjardins v. National Parole Board*, [1976] 2 F.C. 539 (T.D.). See also, D. Lemieux et N. Vallières, *Le fondement constitutionnel du pouvoir de contrôle judiciaire exercé par la Cour fédérale du Canada* (1975), 2 Dal. L.J. 268 at 301-02, where they explain section 18(5) in terms of Quebec and the different remedies available in that province. Insofar as those remedies achieve the same objects as the remedies specified in section 18(*a*), they provide "relief in the nature of that contemplated by paragraph (a)" and are therefore caught by paragraph (b). The same argument would apply to other provinces possessing a different remedial structure (at that time, none).

16a. This issue was raised but not decided by Pigeon, J., delivering the majority judgment in *Howarth v. National Parole Board*, [1976] 1 S.C.R. 453 at 475. However, in *Attorney General of Canada v. Public Service Staff Relations Board* (1977), 14 N.R. 257 (F.C.A.), the Court held that these words nullified the effect of privative clauses in statutes enacted before the *Federal Court Act* and also in statutes enacted after that time when the provision in issue was not "new law" in terms of the *Interpretation Act*, section 36(*f*) (at 260-62). See, also, *MacDonald v. Minister of National Revenue* (1977), 15 N.R. 369 (F.C.A.) and *Iroquois of Caughnawaga v. Minister of National Revenue* (1977), 15 N.R. 377 (F.C.A.), where the point was raised but not resolved.

17. See S. A. de Smith, *Judicial Review of Administrative Action* (London: Stevens, 3rd ed., 1973) at 353-61. There is, of course, the possibility that declaratory relief might be available with respect to non-jurisdictional errors of law, whether they appear on the face of the record or not. See de Smith *id.* at 462-64.

18. For an excellent discussion of the Canadian position as to review for no evidence, see D. W. Elliott, *"No Evidence": A Ground of Judicial Review in Canadian Administrative Law* (1972), 37 Sask. L.R. 48.

19. Presumably, as far as the Trial Division is concerned, undue delay in seeking relief will be, as at common law, a ground for the denial of relief in the court's discretion. It is also noteworthy that, where there is some doubt as to whether the matter comes within the jurisdiction of the Trial Division or the Court of Appeal, the prudent step will be to at least commence Appeal Division proceedings within the ten day period and let the jurisdiction question be sorted out subsequently.

19a. Perhaps, also of significance is section 61(1). This provides:

> **61.** (1) Where this Act creates a right of appeal to the Court of Appeal or a right to apply to the Court of Appeal under section 28 to have a decision or order reviewed and set aside, such right applies, to the exclusion of any other right of appeal, in respect of a judgment, decision or order given or made after this Act comes into force, unless, in the case of a right of appeal, there was at that time a right of appeal to the Exchequer Court of Canada.

One effect of this section was that section 28 applications could only be with respect to decisions or orders made after the Act came into force. (See *e.g.*, *Creative Shoes Ltd. v. Deputy Minister of National Revenue for Customs and Excise*, [1972] F.C. 115 (T.D.), *rev'd* (*sub nom. Minister of National Revenue v. Creative Shoes Ltd.*) [1972] F.C. 993 (C.A.). The section, however, also seems to say that the right to apply under section

28 operates to the exclusion of all statutory rights of appeal. (*Supra*, note 3 at 48-49). See Patrick Kenniff, Comment in *Government Regulation and the Law* (ed. H. N. Janisch) (Halifax: Dalhousie Faculty of Law, 1975) 101 at 107 for a contrary view.) However, if it is a correct analysis, it means that sections 29 and 61(1) are in conflict and the only possible resolution would seem to be to read section 29, the more specific, as governing but only with respect to appeals actually specified therein. In all other cases, section 61(1) applies and excludes the statutory right of appeal in so far as the decision or order is subject to section 28.

20. As amended by S.C. 1974-75-76, c. 18. This repealed section 31(1) which allowed an automatic right of appeal to the Supreme Court of Canada if the matter in controversy was over $10,000 and also substituted a new section 31(3).

21. As already noted (*supra*, note 15), however, the *habeas corpus* jurisdiction of the provincial superior courts was not removed. There are, of course, not all that many federal statutory authorities which have power to confine individuals in custody, so that the scope of the residual *habeas corpus* jurisdiction of provincial superior courts is in statistical terms at least not all that great.

22. See Henderson, *supra*, note 4 at 66-67.

23. See, particularly, Lemieux et Vallières, *supra*, note 16. They refer to Mullan, *supra*, note 3 at 18-21; R. Dussault, *Traité de droit administratif canadien et québecois* (Québec: P.U.L., 1974) at 1005 *ff.*; and H. W. Arthurs, Comment (1962), 40 Can. B. Rev. 505 at 509-11. See 268-69, n. 6 of their article. Also, of significance is the latest article by Professor P. W. Hogg, *Is Judicial Review of Administrative Action Guaranteed by the British North America Act?* (1976), 54 Can. B. Rev. 716 where all the arguments on the broader issue are outlined and the *Federal Court Act* referred to specifically at 727.

24. Discussed *supra*, note 3 at 17-25. See also Lemieux et Vallières, *supra*, note 16 at 289-95 particularly.

25. [1972] S.C.R. 821.

26. Discussed by Hogg, *supra*, note 23 at 727. He also refers to the judgment of Beetz J. in *Attorney General of Canada v. Canard*, [1976] 1 S.C.R. 170 at 216. Here he held that the *Federal Court Act* prevented him from reviewing, in a case commenced in the Manitoba courts, an exercise of statutory power by a Minister under the *Indian Act*. At this point he made no reference to possible arguments about the constitutionality of sections 18 and 28. However, earlier, he in effect dealt with this issue when he upheld the validity of the provision giving the statutory authority to the Minister and taking it away from the provincial court. (*Id.* at 201-03). Note, however, that in holding that the Federal Court alone had jurisdiction where the Minister's jurisdiction was challenged, he also noted that the provincial superior court had jurisdiction where it was a question of the constitutionality of the *Indian Act*, presumably notwithstanding sections 18 and 28 (*id.* at 216). See, *infra*, notes 28-40 and accompanying text. The other majority judges seemed to concur in the first two propositions, though without specific mention of the reservation respecting arguments as to the constitutionality of legisla-

tion. Of course, the mere fact that the court dealt with the argument that the Minister's power was contrary to the *Bill of Rights* but refused to deal with the arguments about whether he had acted within jurisdiction in a non - *Bill of Rights* or *B.N.A. Act* sense, speaks volumes. See Pigeon J. at 193-94; Ritchie J. at 192-93; Martland and Judson JJ. at 189. The dissenting judges, Laskin C.J. and Spence J. did not discuss the matter.

27. *Supra*, note 25 at 826-27.

28. *Supra*, note 9.

29. *Id.* at 372-74.

30. (1973), 32 D.L.R. (3d) 419 (Ont. H.C.).

31. *Supra*, note 9 at 374-75.

32. (1972), 27 D.L.R. (3d) 385 (Ont. C.A.).

33. The court expressly noted that the constitutional issue was not raised. *Id.* at 386. See a similar reservation by Dickson J. in *Klingbell v. Treasury Board*, [1972] 2 W.W.R. 389 (Man. Q.B.) at 394.

34. *Supra*, note 9 at 372.

35. *Id.* at 378.

36. *Id.* at 378-80.

37. *Supra*, note 23 at 720, n. 11 and 728, n. 41.

38. *Supra*, note 9 at 375-76.

39. (1971), 25 D.L.R. (3d) 551 (Ont. H.C.). This issue was not faced by the Supreme Court of Canada when this case was argued together with *Attorney General of Canada v. Lavell.* See [1974] S.C.R. 1349. Note, however, the judgment of Beetz, J. in *Canard, supra*, note 26, which can also be read as support (implicit) for the continued jurisdiction of the provincial superior courts.

40. *Id.* at 555.

41. See, for example, *Bedard v. Isaac, supra*, note 39; *Klingbell v. Treasury Board, supra*, note 33; *Re Milbury and the Queen* (1972), 25 D.L.R. (3d) 499 (N.B.C.A.); *Ex parte Hinks*, [1972], 27 D.L.R. (3d) 593 (Ont. H.C.); *City of Hamilton v. Hamilton Harbour Commissioners, supra*, note 32; *Lingley v. Hickman*, [1972] F.C. 171 (T.D.); *Re Fortier Artic v. Liquor Control Board of Northwest Territories* (1972), 21 D.L.R. (3d) 619 (N.W.T. Terr. Ct.); *Steve Dart Co. v. Board of Arbitration*, [1974] 2 F.C. 215 (T.D.); *Association of Radio and Television Employees of Canada v. C.B.C.*, [1975] 1 S.C.R. 118; *Lavell v. Attorney General of Canada.* [1971] F.C. 347, *rev'd (sub nom. Attorney General of Canada v. Lavell), supra*, note 39 (this was also the appeal in *Bedard v. Isaac*); *McCleery v. The Queen*, [1974] 2 F.C. 339 (C.A.); *Commonwealth of Puerto Rico v. Hernandez*, [1972] F.C. 1076 (C.A.), *rev'd* [1975] 1 S.C.R. 228; *Armstrong v. State of Wisconsin*, [1972] F.C. 1228 (A.); *Attorney General of Canada v. Morrow*, [1973] F.C. 889 (T.D.); *In re Shell Canada Ltd.*, [1975] F.C. 184 (C.A.); *North American News v. Deputy Minister of National Revenue for Customs and Excise*, [1974] 1 F.C. 18

(C.A.); *Vardy v. Scott*, [1977] 1 S.C.R. 293; *Re Ostello and Solicitor-General of Canada*, *supra*, note 15; *Canada Metal Co. Ltd. v. C.B.C. (No. 2)* (1975), 11 O.R. (2d) 166 (C.A.); *Président de la Commission d'Appel des Pensions v. Matte*, [1975] C.A. 22.4.74, no. 09 000036-74; resumé à [1974] C.A. 252 (Que. C.A.); *Re Johnston and Attorney-General of Canada* (1977), 72 D.L.R. (3d) 615 (F.C.A.); *In re Peltier*, [1977] 1 F.C. 118 (T.D.); *Creative Shoes Ltd. v. Deputy Minister of National Revenue for Customs and Excise*, *supra*, note 19a; *Desjardins v. National Parole Board*, *supra*, note 16; *Royal American Shows Inc. v. M.N.R.*, [1976] 1 F.C. 269 (T.D.); *C.R.T.C. v. Teleprompter Cable Communications Corp.*, [1972] F.C. 1265 (C.A.); *Mahaffey v. Nykyforuk,* [1974] 2 F.C. 801 (T.D.); *Russo v. Minister of Manpower and Immigration*, [1977] 1 F.C. 325 (T.D.); *Walker v. Gagnon*, [1976] 2 F.C. 155 (T.D.). (The last two cases involve further peculiarities which I do not develop in the text, though undoubtedly they could be productive of further litigation. In *Gagnon*, the trial judge held that the Commissioner of the R.C.M.P. was not a "federal board, commission or other tribunal" because he was not like a traditional administrative tribunal, this seemingly ignoring section 2(*g*)'s definition. Of greater potential significance is *Russo*, which held that a person who implements decisions is not a "federal board, commission or other tribunal". Section 2(*g*) was seen as covering only decision-makers or investigators appointed under federal statutes. (This kind of thinking also characterizes *Re Lamoureux and Registrar of Motor Vehicles*, [1973] 2 O.R. 28 (D.C.), a decision interpreting the scope of the Ontario Judicial Review Procedure Act, S.O. 1971, c. 48).

42. For a recent discussion of this whole subject, see Denis Lemieux and Nicole Vallières, *La compétence de la Cour fédérale comme organisme bidivisionnel de contrôle judiciaire* (1976), 17 C. de D. 379.

43. *E.g.* the judgment of Osler J. in *Bedard v. Isaac*, *supra*, note 39 where he held that the language was not clear enough (at 555). His lack of sympathy for the Act's purpose in this respect also emerges in *Re Ostello and Solicitor-General of Canada*, *supra*, note 15. There he refers (at 783) to a couple of cases where the provincial superior courts took jurisdiction over federal statutory authorities after the Act was assented to though in neither was the question of jurisdiction raised. The two decisions are, first, that of Wilson J. of the Ontario High Court in *Re Weston and Superintendent of Prison for Women, Kingston*, [1972] 1 O.R. 342 and, secondly, *Re McLeod and Maksymowich* (1973), 38 D.L.R. (3d) 251 (N.W.T. Terr. Ct.). It perhaps should be noted that the *Federal Court Act* had probably not been proclaimed in force when the proceedings in the first of these cases were commenced.

44. See, *e.g.*, *Klingbell v. Treasury Board*, *supra*, note 33; *Re Milbury and the Queen* [1972] 25 D.L.R. (3d) 499 (N.B.C.A.); *Ex parte Hinks*, [1972] 3 O.R. 182 (H.C.); *City of Hamilton v. Hamilton Harbour Commissioners*, *supra*, note 32; *Re Greene and Faguy* (1972), 28 D.L.R. (3d) 297 (Ont. H.C.).

45. *Lingley v. Hickman*, [1972] F.C. 171 (T.D.). The Board of Review was to report to the Lieutenant Governor on whether a person acquitted on a criminal charge on the ground of insanity and confined in a mental

institution at the pleasure of Her Majesty should be released. (See section 547 of *Criminal Code*).

46. *Supra*, note 42 at 389. Note, however, *Vardy v. Scott*, [1977] 1 S.C.R. 293, discussed *infra*, where some weight was attributed to the fact that the person involved was a provincial appointee, albeit that he was exercising authority under a federal statute. See also *Johnston v. Attorney-General of Canada* (1977), 72 D.L.R. (3d) 615 (F.C.A.), where Jackett C.J. suggests (at 617) that the words "any person. . . appointed under or in accordance with a law of a province. . ." may exclude from the *Federal Court Act's* ambit provincially-appointed prosecutors albeit that they exercise powers under federal statutes. This same view was expressed more generally, by the Chief Justice in his article, *The Federal Court of Appeal* (1973), 11 O.H.L.J. 253 at 256-257 where he excluded from the ambit of section 2(*g*):—

    (*a*) a decision or order of a body constituted by provincial statute,

    (*b*) a decision or order of a person or persons appointed under a law of a province

    This article also appeared in French in (1973), 33 R. du B. 94.

47. See *Président de la Commission d'appel des Pensions v. Matte*, [1975] C.A. 22.4.74, no. 09 000036-74; resumé à [1974] C.A. 252 (Que. C.A.). Discussed by Lemieux and Vallières, *supra*, note 42 at 384-85.

48. *Id.* at 390, n. 49.

49. [1972] F.C. 993 (C.A.) at 999.

50. *Supra*, note 48.

51. *Supra*, note 16.

52. See the discussion of this subsection, *supra*, note 16.

53. *Landreville v. The Queen*, [1973] F.C. 1223 T. D.; *Smith v. The Queen*, [1972] F.C. 561 (T.D.). See also *Robertson v. The Queen*, [1972] F.C. 80 (T.D.), *aff'd (sub nom. The Queen v. Robertson)* [1972] F.C. 796 (C.A.), though it is not clear from the Reports whether this action was commenced under section 18 or section 17. See also *McCleery v. The Queen*, [1974] 2 F.C. 339 (C.A.).

54. (1975), 11 O.R. (2d) 166 (C.A.).

55. *Supra*, note 32.

56. *Supra*, note 54 at 170-71.

57. [1974] S.C.R. 1349 at 1379.

58. *Id.*

59. See R.S.C. 1970, c. I-6. For example, by section 81(*d*), a Band Council may make by-laws for "the observance of law and order".

60. See Classes 31 and 32 to Schedule C of the *Income Tax Regulations* (as amended), O. in C. P.C. 1954-1917. See H. H. Stikeman, Q.C., ed., *Income Tax Act Annotated* (Toronto: de Boo, 6th Tax Reform Edition, 1975-76) at 918-19.

61. *Supra*, note 46.

62. [1975] 1 S.C.R. 228 at 238 (*per* Pigeon J.).

63. (*Supra*, note 46) Laskin C.J.C., while dissenting, concurred with the majority on this point (at 297).

64. *Id.* at 308-09. See the comment on this decision by N. M. Fera, (1977) 3 Queen's L.J. 183.

65. See *e.g. In re Shell Canada*, [1975] F.C. 184 (C.A.); *In Re Peltier*, [1977] 1 F.C. 118 (T.D.) following *Hernandez*, *supra*, note 62; *Attorney General of Canada v. Lavell*, *supra*, note 57.

66. *Supra*, note 42 at 387-89.

67. J. E. Côté, Comment (1972), 50 Can. B. Rev. 519.

68. *Supra*, note 62.

69. *Id.* at 238.

70. [1973] F.C. 889 (T.D.).

71. *Supra*, note 42 at 389.

72. *Id.* at 389. In *Hernandez*, a strong dissent was delivered by Laskin J. (Abbott, Judson and Spence JJ. concurring) on this very basis, arguing that the authority of the Federal Court under sections 18 and 28 did not extend to criminal matters, including extradition under the *Extradition Act*. In such cases, *habeas corpus* from a provincial superior court was the appropriate remedy. See also his dissenting judgment in *Mitchell*, *supra*, note 15 at 578-79.

73. *Supra*, note 45.

74. [1976] 1 F.C. 269 (T.D.).

75. *Supra*, note 65.

76. See, particularly, Nicholls, *supra*, note 10 at 257-262. Also, Henderson, supra, note 4 at 68-75 and Mullan, *supra*, note 3 at 25-33.

77. Contrast the two Supreme Court of Canada decisions, *Guay v. Lafleur*, [1965] S.C.R. 12 and *Saulnier v. Quebec Police Commission* [1976] 1 S.C.R. 572 and, also, the Trial Division of the Federal Court judgments in *"B" v. Department of Manpower and Immigration* [1975], F.C. 602 (T.D.) and *Desjardins v. National Parole Board*, *supra*, note 16. For a good discussion of the pre-*Saulnier* law, see R. D. Howe, *The Applicability of the Rules of Natural Justice to Investigatory and Recommendatory Functions* (1974), 12 O.H.L.J. 179. For comments on *Saulnier*, see D. P. Jones, *Comment* (1975), 53 Can. B. Rev. 802 and Henri Brun, *La "discrétion administrative" a la vie dure* (1975), 16 C. de D. 723 at 729.

78. See *e.g.* *"B"*, *id.*; *Desjardins v. National Parole Board*, *supra*, note 16; *Grauer Estate v. The Queen*, [1973] F.C. 355 (T.D.); *R. ex rel. Gilbey and Steffensen v. Gunn*, [1977] 1 F.C. 125 (T.D.). 1976. Discussed *infra*.

79. *Viz.* that the decision is not one of a purely administrative nature.

80. As reflected in *Guay v. Lafleur*, "*B*" and the article by Howe, *supra*, note 77.

81. [1976] 1 F.C. 98 (C.A.). See also *Lingley v. Hickman*, *supra*, note 45, where the Trial Division decided that such a Board was a "federal board. . ." for the purposes of section 2(*g*). Discussed *supra*. The first *Lingley* case involved a motion to strike out proceedings for a declaratory judgment in the Trial Division. These proceedings were subsequently dismissed on substantive grounds. See [1973] F.C. 861. See also *Penner v. Electoral Boundaries Commission for Province of Ontario*, (1976), 14 N.R. 341 (F.C.A.).

82. R.S.C. 1970, c. C-34 (as amended), s. 547.

83. Section 547(5) of the *Code* merely states that the Board is to make a report to the Lieutenant Governor of the province and does not detail how that official is then to act.

84. See *e.g. Saulnier*, *supra*, note 77 and, particularly, *Desjardins*, *supra*, note 16, where the situation involved a recommendation to the Governor in Council by the National Parole Board.

85. *Supra*, note 80.

86. *Juneau* [1971] F.C. 73 (C.A.).

87. *Id.* at 79.

88. *Id.* at 78.

89. *Id.*

90. *Id.*

91. [1968] 1 Ex. C.R. 326.

92. *Id.* at 326-330. Note, also, *Penner v. Electoral Boundaries Commission for Province of Ontario*, *supra*, note 81, where this seems to have been applied. However, the judgment in that case is also strengthened by the fact that the function in issue was purely recommendatory. *Quaere* what the position would be if the multiple stages of decision were statutorily mandated. Indeed, this also has relevance to the other categories of decision listed by Jackett C.J. in the *National Indian Brotherhood* case, was not discussed there but has come into prominence subsequently. Discussed, *infra*.

93. *Supra*, note 86 at 78.

94. *Supra*, note 78.

95. *Id.* at 358.

96. *Id.* at 358-59.

97. [1973] F.C. 126 (C.A.). Discussed by Lemieux and Vallières, *supra*, note 42 at 398-99 and noted by Norman M. Fera, *Judicial Review Under Sections 18 and 28 of the Federal Court Act* (1975), 21 McG. L.J. 255 at 260-61. For a detailed discussion of this whole topic, see Lemieux and Vallières, *id.* at 390-99 and Henri Brun, *Le contrôle judiciaire des*

decisions interlocutoires des autorités administratives (1976), 54 Can. B. Rev. 590, particularly at 605-12.

98. [1973] 1 F.C. 1166 (C.A.).

99. [1974] 1 F.C. 22 (C.A.).

100. [1973] F.C. 1194 (C.A.).

101. [1975], F.C. 447 (C.A.).

102. [1974] 1 F.C. 324 (C.A.).

103. *Supra*, note 65 at 121-22.

104. *Supra*, note 100.

105. *Supra*, note 98.

106. Note that in both *B.C. Packers* (*supra*, note 100) and *Danmor Shoe* (*supra*, note 99), the Court of Appeal was careful to note that it was considering the meaning of the word "decision", and not that of "order". See *B.C. Packers* at 1199, n. 1 and *Danmor Shoe* at 30, n. 5.

107. *Canada Labour Code*, R.S.C. 1970, c. L-1, as amended by S.C. 1972, c. 18, s. 1, inserting section 118(*p*).

108. *Supra*, note 100 at 1197. Thurlow J., in delivering the judgment of the court, also suggested that all section 118(*p*) might have achieved is to allow the board to make decisions on all matters in their final decision and not by way of separate interlocutory ruling.

109. *Supra*, note 102.

110. *Id.* at 325-26. Note also *Center for Public Interest Law v. C.T.C.*, [1974] 1 F.C. 322, where the same court held that this was not a "decision" for statutory appeal purposes either. Interestingly, the Court of Appeal in this case was not constituted by the same judges involved in *B.C. Packers*, *Cylien* and *Danmor Shoe*. Rather, there was only one Court of Appeal judge, Urie J., and two Trial Division judges, Addy and Decary JJ.

111. *Supra*, note 65.

112. *Id.* at 122. The Act, by section 13, made the *Criminal Code* provisions with respect to remand in custody applicable.

113. Note that the Trial Divison has been following the Court of Appeal's lead in this matter. *Peltier*, *supra*, note 65, is a prime example, though arguably one that goes further than the Court of Appeal would have. See also *Millward v. Public Service Commission*, [1974] 2 F.C. 530 (T.D.) (Cattanach J.) where rulings on the private or closed nature of proceedings and on a request for an adjournment were held not to be "decision[s] or order[s]" for section 28 purposes. Similarly, in *Royal American Shows Inc. v. M.N.R.*, *supra*, note 74 (Gibson J.), *Cylien*, *supra*, note 98 was relied upon for the proposition that a search and seizure authorized by the Minister under the *Income Tax Act* was not a matter for review under section 28, albeit that the decision had judicial elements. Arguably, this also goes too far. Both are discussed by Brun,

supra, note 97 at 611-612. *Millward* is also discussed by Norman M. Fera, *Conservatism in the Supervision of Federal Tribunals: The Trial Division of the Federal Court Considered* (1976), 22 McG. L.J. 234 at 244-46 and 260-62. See also J. M. Evans, *The Trial Division of the Federal Court: An Addendum* (1977), 23 McG. L.J. 132 at 140-41.

114. *War Amputations of Canada v. Pension Review Board*, *supra*, note 101.

115. See *Danmor Shoe*, *supra*, note 99 at 30, n. 5. See also the subsequent case of *Penner v. Electoral Boundaries Commission for the Province of Ontario*, *supra*, note 81 at 346.

116. *Supra*, note 101 at 451.

117. *Id.* at 462-63.

118. *Id.* at 462.

119. *Id.* at 461-62

120. *Id.* at 450.

121. *Supra*, note 86 at 77.

122. *Supra*, note 100 at 1198.

123. Discussed *infra*.

124. *Supra*, note 99 at 30, n. 4.

125. [1976] 1 F.C. 446 at 453. The Chief Justice here outlined in some detail the remedial possibilities where a tribunal's jurisdiction is challenged in the course of proceedings. As well, the tribunal is told how to proceed. I will return later to the whole question of the availability of *mandamus* from the Trial Division. Note, however, *Mansanto Co. v. Commissioner of Patents*, [1976] 2 F.C. 476, where the Court of Appeal reversed the Trial Division's judgment ([1975] F.C. 197) and held that *mandamus* was available to compel the Commissioner to register a disclaimer. The Trial Division judge had held that *mandamus* was not available in this case because the refusal of the Commissioner to register was a "decision" covered by section 28(1) and over which the Trial Division had no jurisdiction by virtue of section 28(3) (at 214-215).

However, the Court of Appeal held that his refusal to register was not a "decision" but a failure to perform a legal duty and was therefore properly the subject of a *mandamus* order under section 18 (at 477). Presumably, this only makes sense in situations where a statutory authority thinks it has a discretion but does not, and not in situations where it declines to perform a function on the basis of a finding of law or fact. To say that the latter is not a "decision" is incomprehensible. Yet it appears that this is what was accepted by the Court of Appeal, in that the Commissioner refused to register after deciding that what was proffered was not a disclaimer. The Court of Appeal here followed the earlier decision of *Bay v. The Queen*, [1974] 1 F.C. 523 (C.A.), where the issue was canvassed by all three judges and *Danmor Shoe* applied. It is also worth noting that *certiorari* is almost certainly not available from the Trial Division with respect to interlocutory rulings not covered by section 28(1). See *Cylien*, *supra*, note 98 at 1178-79 (Appendix), repeated

in *Danmor Shoe*, *supra*, note 99 at 33. See also *In Re Peltier*, *supra*, note 65 at 123-24 and *Union Gas v. Trans Canada PipeLines*, [1974] 2 F.C. 313 (T.D.) at 324, discussed by Lemieux and Vallières, *supra*, note 42 at 424 in Brun, *supra*, note 97 at 610-11; Evans, *supra*, note 113 at 140-41.

126. See the *National Indian Brotherhood* case, *supra*, note 86, where Jackett C.J. describes the effect of applying section 28(1) to interlocutory rulings as placing "an instrument for delay and frustration in the hands of the parties" (at 78).

127. See Thurlow J's judgment in *B.C. Packers*, where such a course of action was recommended. *Supra*, note 100 at 1198.

128. [1974] 2 F.C. 913 (T.D.). Indeed, as noted by Thurlow J. in his judgment, *supra*, note 100 at 1194, the applicants commenced an earlier application for prohibition in this case before the Canada Labour Relations Board had ruled on the constitutional issue. This was coupled with a request to the board to stay proceedings until the prohibition application was dealt with, a request that was refused. For a similar discussion of the whole *B.C. Packers* affair, see Henri Brun's article, *supra*, note 97 at 608-09.

129. [1976] 1 F.C. 375 (C.A.).

130. As the *B.C. Packers* case itself illustrates. See also *Wardair v. C.T.C.*, [1973] F.C. 597, where the Trial Division held that prohibition or an injunction is not available from the Trial Division in order to stay proceedings once a section 28 application has been launched (at 602-03), unless for lack of jurisdiction. See also *Penner v. Representation Commissioner for Canada*, [1977] 1 F.C. 147 (T.D.) and *Tsakiris v. Minister of Manpower and Immigration* (1977), 15 N.R. 224 (F.C.A.).

131. Once again the *B.C. Packers* case illustrates an attempt at this when the applicants sought prohibition even before an initial ruling had been made by the Board as to the jurisdictional question. See also *In re Immigration Act* and in *re Gray*, [1976] 2 F.C. 446 (T.D.) and *Maritime Telegraph & Telephone Co. Ltd. v. Canada Labour Relations Board*, [1976] 2 F.C. 343 (T.D.).

This problem also manifested itself in the controversial decision of Dubé J. in *Re Capital Cable Co-operative*, [1976] 2 F.C. 627 (T.D.) where he issued *mandamus* to compel the C.R.T.C. to deal with the applicant's application for a licence from the C.R.T.C. as part of its consideration of another company's application for renewal. This decision was reversed summarily by the Court of Appeal without reasons ([1976] 2 F.C. 633; leave to appeal refused (1976), 10 N.R. 269 (S.C.C.)). Presumably the comment can be made that, given the general review and appeal jurisdiction of the Court of Appeal over the C.R.T.C., it would perhaps have been more appropriate had this matter gone before the Court of Appeal in the first place. The decision has been commented on, though not from this perspective by René Pépin, *Comment* (1976), 54 Can. B. Rev. 762.

132. Discussed in *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756 at 775. See also *Gray* and the *M.T.&T.* cases where prematurity defeated applications for prohibition (*id.*)

132a. The words "by law" would seem to include statutes, regulations and the

common law. However, in *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board* (1977) 14 N.R. 285 (S.C.C.)., the Supreme Court of Canada by a majority of 5-4 held that they did not include Commissioner's directives made under the *Penitentiary Act*. This obviously raises serious difficulties about many categories of subordinate instruments or policy statements and may well be productive of further litigation.

133. See S. A. deSmith, *supra*, note 17, chapter 2.

134. *Supra*, note 10 at 257-62.

135. This is more fully developed in the U.T.L.J. article, *supra*, note 3 at 25-33. See, particularly, n. 57 at 29-30.

136. See *e.g. Re Cloverdale Shopping Centre Ltd. and Township of Etobicoke*, [1966] 2 O.R. 439 (C.A.), which I discuss in *Fairness: The New Natural Justice?* (1975), 25 U.T.L.J. 281 at 291.

137. The subject matter of *Fairness: The New Natural Justice? id.*

138. The first U.K. case suggesting that there was a duty to act fairly, with a procedural content irrespective of classification, was the 1967 decision of *In re H. K. (An Infant)*, [1967] 2 Q.B. 617 (D.C.). It next surfaced in late 1968 in *Schmidt v. Secretary of State for Home Affairs*, [1969] 2 Ch. 149 (C.A.) and really did not catch fire till after the enactment of the *Federal Court Act*. See *Fairness: The New Natural Justice? id.* at 283-88.

139. See *e.g. Mahaffey v. Nykyforuk*, [1974] 2 F.C. 801 (T.D.); *Blais v. Basford*, [1972] F.C. 151 (C.A.); *Lazarov v. Secretary of State of Canada*, [1973] F.C. 927 (C.A.); *War Amputations of Canada v. Pensions Review Board*, *supra*, note 101; *Armstrong v. State of Wisconsin*, [1972] F.C. 1228; *McCleery v. The Queen*, *supra*, note 53; *Kedward v. The Queen* [1976] 1 F.C. 57 (C.A.); *Champoux v. Great Lakes Pilotage Authority*, [1976] 2 F.C. 399 (C.A.).

140. Either in prohibition applications or in deciding whether they rather than the Federal Court of Appeal have jurisdiction. See *e.g. Vara v. Minister of Manpower & Immigration*, [1976] 2 F.C. 139 (T.D.); *Royal American Shows Inc. v. M.N.R.*, *supra*, note 74.

141. See *Blais v. Basford*, *supra*, note 139 at 162-64 and *Lazarov v. Secretary of State of Canada*, *id.* at 934-37.

Actually, the English decisions were not specifically mentioned in *Blais v. Basford* but the approach there reflected the English fairness cases. Discussed in *Fairness: The New Natural Justice? supra*, note 136 at 293-94. See also Lemieux and Vallières, *supra*, note 42 at 402-03. Generally, on the administrative/judicial dichotomy in the context of section 28(1), see also Lemieux and Vallières at 399-409.

142. [1975], F.C. 11 (C.A.).

143. For a discussion of the problems of classifiction of functions in these areas see the following: Lemieux and Vallières, *supra*, note 42 at 403-409; *Fairness: The New Natural Justice? supra*, note 136 at 281-83 and 294-96; H. Brun, *La "discretion administrative" a la vie dure*, *supra*, note 77 at 724-27; S. Silverstone, *Comment* (1975), 53 Can. B.

Rev. 92; D. P. Jones, *Howarth v. National Parole Board — A Comment* (1975), 21 McG. L.J. 434 (all in relation to the Supreme Court of Canada decision in *Howarth v. National Parole Board*, *supra*, note 16a. See more generally, R. R. Price, *Bringing the Rule of Law to Corrections* (1974), 16 Can. J. of Crim. and Corr. 209. Note, also, the possibilities for provincial superior court review raised in Thomas A. Cromwell "Parole Committals and *Habeas Corpus*" (1976), 8 Ott. L.R. 560.

144. [1965] 1 C.C.C. 168 (S.C.C.).

145. *Supra*, note 16a.

146. *Supra*, note 15.

147. See the more recent cases of *Martineau & Butters v. Matsqui Institution Inmate Disciplinary Board* [1976], 2 F.C. 198 (C.A.), *aff'd* by the Supreme Court of Canada, though on a different basis, *supra*, note 132a (section 28(1) does not apply to proceedings of Disciplinary Board); *Kosobook v. Solicitor General of Canada*, [1976] 1 F.C. 540 (T.D.) (Gibson J.) (section 18 action for declaration struck out — no section 18 relief for allegations of breach of natural justice requirements by Classification Board — purely administrative); *McCann v. The Queen and Cernetic*, [1976] 1 F.C. 570 (T.D.) (Heald J.) (basically the same as *Kosobook*, but solitary confinement declared to be cruel and unusual punishment contrary to section 2(*b*) of the *Canadian Bill of Rights*); *In re Nicholson*, [1975] F.C. 478 (T.D.) (*Howarth* applied to revocation of mandatory supervision in proceedings before the Trial Division and jurisdiction held to be only ground of review (at 481)). Note, however, the different approach of the Trial Division in *Desjardins v. National Parole Board*, *supra*, note 16, which involved the National Parole Board designated specially to inquire into the possible revocation of a pardon under the *Criminal Records Act*. See also *Auger v. Canadian Penitentiary Service*, [1975] F.C. 330 (T.D.) (*dicta* to effect that calculation of remission to be forfeited on the revocation of parole may be a function within the ambit of section 28).

148. *Supra*, note 139.

149. [1976] 1 S.C.R. 376. See H. Brun, *La "discrétion administrative" a la vie dure*, *supra*, note 77 at 727-29.

It is however, only fair to the Supreme Court to point out that the decision in *Prata* affirmed that reached by the Federal Court of Appeal. See [1972] F.C. 1403 (C.A.). For another comment on the decision, see John Hucker, *Comment* (1975), 53 Can. B. Rev. 811.

150. [1976], 2 F.C. 746 (C.A.) (MacKay D.J. dissenting).

Now reversed on appeal by the Supreme Court of Canada ((1977), 15 N.R. 396). The judgment of the nine person court was delivered by Spence J.

151. *Id.* at 751-53.

152. *Supra*, note 77.

153. See references in footnote 77 generally.

154. *Supra*, note 81.

155. *Supra*, note 97 at 591-601. Brun here discusses I. Les décisions temporaires ou provisoires and II. Les décisions conservatoires, and is generally quite critical of the court's performance, arguing for a more rigorous application of natural justice principles in relation to both these categories. He is particularly critical of the Federal Court of Appeal decision in *In re Pilotage Act* and *in re Darnel*, [1974] 2 F.C. 580 (C.A.) (at 593-94) and *Lambert v. The Queen*, [1975] F.C. 548 (T.D.) (at 599). *Darnel* involved confirmation of the suspension of a pilot by the pilotage authority. The court held that in confirming the suspension the Pilotage Authority was not subject to section 28 because it was a purely administrative function. Brun criticizes this given that the first decision to suspend would not be subject to procedural requirements either because of urgency. However, this possibility was not adverted to by the Court of Appeal. In *Lambert*, assets of the applicant were seized after he had been reassessed for tax even though he had lodged an objection. Relying on *Howarth* (*supra*, note 16a), Addy J. of the Trial Divison classified the seizure as purely administrative and not subject to review on procedural grounds under section 18.

156. [1974] 2 F.C. 704 (C.A.).

157. [1976], 2 F.C. 217 (C.A.).

158. [1975] F.C. 533 (C.A.).

159. *Supra*, note 81.

160. See "*B*", *supra*, note 77 for a dramatic illustration of the potential difficulties even here. (Discussed *infra*). Note, however, the special place of the declaratory action being acknowledged by the Federal Court of Appeal in *Rothmans of Pall Mall Canada Ltd. v. M.N.R. (No. 2)*, [1976] 2 F.C. 512 (C.A.) at 515 (*per* Le Dain J.).

161. See *supra*, note 46 at 99 (French version) and at 256-257 (English version).

162. *Supra*, note 101 at 451. However, he was content to base his judgment on the alternative ground that the decision had to be made on a judicial or quasi-judicial basis (451-52) Urie J. at 463-64 relied solely on the latter ground. Pratte J. concurred with both judges.

163. See *Robertson v. The Queen*, *supra*, note 53 as an example of the Trial Division making a declaration as to invalidity of subordinate legislation made by the Governor in Council.

164. By virtue of Rule 359.

165. The potential for confusion is illustrated dramatically by the National Indian Brotherhood's attempt in 1971 to have the C.R.T.C. hold a public hearing into the C.T.V. Network's intention to show a movie which allegedly placed Indians in a most unfavourable light. Because of uncertainty as to jurisdiction, proceedings were commenced in both divisions. In the Trial Division, Walsh J. initially refused to deal with the matter as it was also before the Court of Appeal (*National Indian Brotherhood v. Juneau (No. 1)* [1971] F.C. 66). However, in the Court of Appeal (*supra*, note 86), Jackett C.J. (at 80) said that the Trial Judge should have considered and ruled on the jurisdictional issue. This, of

course, raises the possibility of either both courts assuming or both courts declining jurisdiction, in which case the Trial Division judgment would have to be appealed to the Court of Appeal, at least in situations where the Trial Division declined jurisdiction, or, alternatively, Rule 343 could be invoked. Note, however, that there has never been any suggestion in the Federal Court of Appeal decisions, where jurisdiction was declined because a "decision or order" was not involved, that the proceedings could be transferred to the Trial Division as an application for either prohibition or *mandamus*.

166. Section 28(2). It is almost certain that the reference to either the Deputy Attorney General or that party, does not mean that time starts running for everyone once *either* is notified. Rather, the time runs for the Attorney General from the time the Deputy is notified and for parties from the time they are notified.

167. See deSmith, *supra*, note 17 at 373-74 and 379-80.

168. Indeed, delay is normally associated with other factors before relief is refused *e.g.* substantial reliance on the decision. See *e.g. R. v. B.B.G., Ex parte Swift Current Telecasting Co. Ltd.*, [1962] O.R. 657 (C.A.).

169. Rule 56.06. In England, the position is the same, though leave may be given to extend the six month period. Discussed by deSmith, *supra*, note 167.

169a. See *e.g. Blais v. Andras*, [1972] F.C. 958 at 959-60 (C.A.). Indeed, even if the grounds of attack are set out in the application, the applicant is neither bound nor restricted to them. (See *Blais v. Andras*, *id.*) Rather, the crucial time is three weeks from the receipt of the case from the tribunal or the court. See Rule 1403(1), except in the case of applications to review and set aside deportation orders under the *Immigration Act* (a very significant proportion of the court's work — see Appendix No. 2); these cases are provided for in 1403(5). It is then that the applicant is required to file a memorandum of the points to be argued and, at this time, the grounds for review must be specified and presumably may not thereafter be extended, except possibly with leave of the court.

By contrast, it would seem that in proceedings under section 18, whether by way of motion (under Rule 319) or action (under Rule 400), the originating document should specify the grounds. Of course, such proceedings are not subject to the ten day commencement period that applies to section 28(1) applications.

170. See *e.g.*, *Penner v. Electoral Boundaries Commission for Province of Ontario*, [1976] 2 F.C. 614 (T.D.). Prohibition and *mandamus* were refused partly on the basis of too long a delay in seeking relief.

170a. One possible argument that might be made is that a section 18 application for *certiorari* can be made if the time expires under section 28 and an extension is not granted. However, it is extremely dubious whether this would be successful. Section 28(3), the subsection which excludes the Trial Division's jurisdiction uses the words "Where the Court of Appeal *has jurisdiction*" (emphasis added) and it would seem difficult to argue that the case ceases to be one in which the Court of Appeal has jurisdiction simply because the ten day time period has expired and even if an extension has been refused.

171. See *e.g.*, *Montreal Flying Club Inc. v. Syndicat des Employés de l'Aero-Club de Montréal* (1975), 7 N.R. 177 (C.A.) (no extension because two month's unexplained delay); *Benoit v. Public Service Commission of Canada*, [1973] F.C. 962. What will be a sufficient explanation is not clear.

172. See *Montreal Flying Club* and *Benoit* cases (*id.*) again. Also, see *Lignos v. Minister of Manpower and Immigration*, [1973] F.C. 1073 (C.A.).

173. *Consumers' Association of Canada v. Hydro-Electric Power Commission of Ontario No. 2*, [1974] 1 F.C. 460 (C.A.).

174. See *e.g. Wall v. Interprovincial PipeLine Ltd.*, [1976] 1 F.C. 415 (C.A.). Discussed *infra*.

175. Most prominently of course in the Supreme Court of Canada decisions of *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138 and *Nova Scotia Board of Censors, v. McNeil* [1976] 2 S.C.R. 265. The current debate is as to whether these two cases and their liberalization of standing requirements are restricted to constitutional cases. See *e.g.* Yes: *Rosenburg v. Grand River Conservation Authority* (1976), 69 D.L.R. (3d) 384 (Ont. C.A.); *Rothmans of Pall Mall Canada Ltd. v. M.N.R. (No. 1)*, [1976] 2 F.C. 500 (C.A.). No: *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 (D.C.). See also D. J. Mullan *Standing After McNeil* (1976), 8 Ott. L. Rev. 32 at 43-45.

175a. There is also a possibility of the same argument being made here as was just identified in relation to the ten day requirement. *If* section 28(2) is narrower than the common law standing requirements, then it may be that someone who fits within the common law requirements but not the statutory formulation could seek relief from the Trial Division notwithstanding section 28(3). However, this is just as dubious here, given that the court is almost certainly going to rule that "jurisdiction" in section 28(3) has the same meaning as "jurisdiction" in section 28(1).

176. *Supra*, note 175.

177. *Id.* at 162, citing H. W. R. Wade, *Administrative Law* (Oxford: Clarendon Press, 3rd ed., 1971) at 138. It must be noted, of course, that it is impossible to find an example of this in the reported cases and for that reason is rather dubious law. See deSmith, *supra*, note 17 at 369. See also S. M. Thio, *Locus Standi and Judicial Review* (Singapore: Singapore University Press, 1971) at 81-83 and 91-95.

178. See *e.g. Rogers v. Special Town and Country Planning Board*, [1973] 1 N.Z.L.R. 529 (C.A.).

179. This of course is the thrust of *Thorson* and *McNeil*, *supra*, note 175, *viz.* that *locus standi* should depend on the discretion of the court in each case, a discretion exercised after a consideration of a number of factors including the nature of the challenge and its strength. See *e.g. Thorson*, at 161.

180. *Supra*, note 62.

181. *Id.* at 240.

182. [1976] 2 F.C. 82 (C.A.).

183. *Id.* at 92. Note this part of the decision is arguably *dicta*, since this case was properly dealt with as a statutory appeal rather than as an application to review and set aside under section 28 (this aspect is discussed *infra*.). However, Ryan J. agreed with Urie J. on this issue (at 100). Thurlow J. also agreed with Urie J. (at 84).

184. *Id.* at 93. Referred to as a "demonstrable interest".

185. *Id.* at 93-94.

186. *Id.* at 93. It is dubious whether it could be argued that they were "directly affected" in this capacity unless one is prepared to see a threat to their positions by virtue of a change in the company's shareholding as being sufficient — quite a step, I would suggest.

187. Discussed by John P. Manley, Note (1976), 8 Ott. L. Rev. 655 at 658-59. It is interesting to contrast the Court of Appeal's judgment on this point in the *John Graham* case with the recent treatment of a standing issue in a section 18 matter. In *Rothmans of Pall Mall Canada Ltd. v. M.N.R.*, [1976] 1 F.C. 314 (T.D.), *aff'd* [1976] 2 F.C. 500 (C.A.) and *Rothmans of Pall Mall Ltd. v. M.N.R. (No. 2)*, *supra*, note 160 (C.A.), Rothmans were denied standing to seek a range of section 18 remedies. The Trial Division and the Court of Appeal held that a claim for standing based on an alleged competitive advantage given to a trade rival by an M.N.R. "ruling" was not sufficient given that the ruling did not directly affect the company's present or contemplated line of goods.

188. [1967] 2 A.C. 337 (J.C.).

189. *Id.* at 352-55.

190. [1972] F.C. 390 (C.A.) at 408 (Both other judges delivered separate judgments not mentioning this aspect).

191. [1972] F.C. 469 (C.A.) at 480 (Here, once again, there were separate judgments not mentioning the point delivered by the other two members of the Court).

192. (1976), 9 N.R. 181 at 203-04.

193. (1976), 9 N.R. 345 at 352 (de Grandpré J., speaking for a nine-man Court).

194. See *Transair*, *supra*, note 192 at 204 (*per* Spence J.). While Spence J. was in dissent, the two other dissenting judges (at 184) and Beetz J. (at 202) and Pigeon J. (at 184) of the majority supported him on this issue, thus making a majority in the seven-man court. Laskin C.J.C. (with whom Judson J. (at 184) concurred) would have included natural justice as jurisdictional error for such purposes (at 185-86).

195. In the *Central Broadcasting* case, it seems to have been argued that the Board asked itself the wrong question as in *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*, [1970] S.C.R. 425. *Supra*, note 193 at 348-49.

196. [1977] 1 F.C. 19 (T.D.). See, however, *Rothmans of Pall Mall Canada Ltd. v. M.N.R. (No. 2)*, *supra*, note 160, where lack of standing was one of the reasons for striking out the action. However, this may have

resulted from *No. 1*, *supra*, note 187, where there was an adverse finding on standing at trial.

197. See *Carota v. Jamieson & Lessard*, [1977] 1 F.C. 504 (T.D.) (Dubé J.), affirmed by Federal Court of Appeal, unreported decision, delivered January 20, 1977. Note also Rule 1405 which gives the Court of Appeal authority to decide who shall be heard on the argument of a section 28 application. See *The Queen v. Bolton*, [1976] 1 F.C. 252 (C.A.) (it is not sufficient that a party may be interested in future or other litigation involving the same point).

198. *Supra*, note 16. Though, in that case, the court held that the proper defendant was the Attorney General of Canada, the Crown itself not being subject to review, at least directly, under section 18.

199. This possibility is discussed by Henderson, *supra*, note 4 at 81-83; Lemieux and Vallières, *supra*, note 42 at 413-15; W. R. Jackett, *Manual of Federal Court Practice* (Ottawa: Information Canada, 1971) at 24; Mullan, *supra*, note 3 at 46-47.

200. [1973] F.C. 1206 (C.A.). This was the reconsideration which took place after the Supreme Court of Canada ruled that the Federal Court of Appeal had jurisdiction (*supra*, note 62).

201. *Id.* at 1207-08. The narrow scope that the Court of Appeal has attributed to section 28(1)(*c*) is discussed further, *infra*. Suffice it to say, that the *Hernandez* and *Mojica* cases have confounded the predictions of the authors mentioned in footnote 199 that there was a residual power of review under section 28(1)(*c*) when there was a statutory right of appeal on questions of law and jurisdiction.

202. [1977] 1 F.C. 458 (C.A.). See also *Saskatchewan Power Corporation v. TransCanada PipeLines Ltd. (No. 2)* (1977), 15 N.R. 88 (F.C.A.) and supporting *dicta* in *Button v. Minister of Manpower and Immigration*, [1975] F.C. 277 (C.A.) at 283.

203. Discussed in my Federal Court article, *supra*, note 3 at 47. See also Jackett, *supra*, note 199: —

> In the case of an unrestricted right of appeal, the matter is relatively simple. It seems clear that any grievance that may be remedied by an application to set aside a decision under section 28 may be remedied by the exercise of an unrestricted right of appeal.

204. Note again Rule 1100(2) which allows the Court of Appeal to proceed under section 52(*a*) of its own motion, provided interested parties are given a chance to be heard.

205. *Supra*, note 102.

206. *Supra*, note 100.

207. *Supra*, note 46.

208. One also gets the feeling reading this case, that the court, if necessary, would have also quashed the proceedings on the ground that a "federal board, commission or other tribunal" was not involved nor was a "decision or order". See the judgment of the court, delivered by Jackett C.J., at 617-18 (*id.*). The function in question was an attempt by the

Crown Attorney in and for the Northwest Territories to seek a greater punishment against the applicant under sections 236(1)(*d*) and 740(1) of the *Criminal Code* because of previous corrections.

209. *Supra*, note 196 and accompanying text.

210. *Supra*, note 202.

211. *Supra*, note 174.

212. See *e.g. Nanda v. Appeal Board Established by the Public Service Commission*, [1972] F.C. 277 (C.A.) and *Button v. Minister of Manpower and Immigration supra*, note 202. (This latter case involved a statutory appeal.)

213. *Supra*, note 125 and *infra*.

214. *Supra*, note 100 at 1198. See also the Appendix to Jackett C.J.'s judgment in *Danmor Shoe*, *supra*, note 99 at 34-35, where it is suggested that it extends as far as all interlocutory jurisdictional and procedural issues that arise for decision in the course of a tribunal's decision-making process.

215. Note that only section 28(1) tribunals may take advantage of section 28(4).

216. *In re Canadian Arctic Gas Pipeline Ltd.* [1976] 1 F.C. 20 (C.A.), *rev'd* (*sub nom. Committee for Justice and Liberty v. National Energy Board*) (1976), 9 N.R. 115 (S.C.C.). The reversal was simply on the merits of the question asked, the Supreme Court of Canada having nothing to say about the appropriateness of using section 28(4) in such a case.

217. *Re Tariff Board Act*, (1977), 15 N.R. 361 (F.C.A.).

218. *Martin Service Station Ltd. v. M.N.R.*, [1974] 1 F.C. 398 (C.A.).

219. *Supra*, note 216. Particularly, as the Supreme Court of Canada found that there was a reasonable apprehension of bias.

220. [1973] F.C. 604 (C.A.). Here it seems that the question was simply not framed precisely enough in the sense that it did not relate to a real issue that the tribunal had to decide, albeit that it was very close to it.

221. Interestingly, in the *Canadian Arctic Gas Pipeline* case, *supra*, note 216, this simply took the form of an account by the board of those "facts" that it knew and which had been presented to it. At 23, the Court of Appeal emphasized that these were not in dispute. The court then said in a passage (at 23-4) which is difficult to fathom:—

> Moreover, if the question raised is regarded, as we think it may be, as one going to the jurisdiction of the Board, within the meaning of the word "jurisdiction" in subsection 28(4), it appears to us that since no facts other than those set out in the order and the exhibits thereto have been put forward by any party the material before us, on which the question of jurisdiction is to be decided, must necessarily lead to the same result.

222. *Supra*, note 217.

223. *Id.* at 405-06.

224. *Quaere* whether this view might not be affected by the decision of the

Supreme Court of Canada in the *Transair* case (*supra*, notes 192 and 194), where, as noted already, the court said that natural justice was not a question affecting jurisdiction when it was a question of the standing of the tribunal being challenged to make arguments before a court.

225. *Supra*, note 4 at 68. Mr. Henderson's hope seemed to be that the grounds on which the remedies are available would be expanded by the Court. My concern in this section is more narrow. Have the remedies worked well in the sense of being free from needless technicalities?

226. *Supra*, note 113. See also J. M. Evans, *supra*, note 113 at 143: —

> In conclusion, it is difficult to find in the jurisprudence of the Trial Division of the Federal Court a fertile source of principled doctrinal innovation.

227. *Supra*, note 42 at 418-22.

228. *Id.* at 434. See also the following statement at 420: —

> La Division de première instance est soucieuse d'utiliser pleinement sa compétence générale en matière de surveillance et de contrôle de l'Administration que l'article 28 n'a pas accaparée. A cette fin, elle ne considère pas l'énumération des recours prévus à l'article 18 comme autant de compartiments etanches, mais plutôt de manière globale.

229. They instance, *inter alia*, *Landreville v. The Queen*, *supra*, note 53 at 1229; *In re MacDonald*, [1975] F.C. 543 (T.D.) (see, however, note 246; *infra* and accompanying text); *Creative Shoes Ltd. v. Deputy Minister of National Revenue for Customs and Excise*, *supra*, note 194 at 120; *Lingley v. Hickman*, *supra*, note 45 at 181; *Rossi v. The Queen*, [1974] 1 F.C. 531 (T.D.) at 535; *Auger v. Canadian Penitentiary Service*, *supra*, note 147 at 332; *In re Anti-dumping Tribunal and re Transparent Sheet Glass*, [1972] F.C. 1078 (T.D.) at 1123.

230. *Supra*, note 77.

231. *Id.* at 621.

232. *Id.* at 614-21.

233. *Id.* at 622.

234. *Id.* at 608-13.

235. *Id.* at 608, 614 and 621.

236. *Id.* at 613-14 and 616.

237. *Id.* at 621.

238. These difficulties will be discussed in relation to the particular remedies involved.

239. Though the defendant would have to be the Attorney General and not the Commission on the basis of Addy J.'s judgment. *Supra*, note 232. I discuss Rule 603 in more detail later.

240. See section 2(2)(*b*) of the British Columbia *Judicial Review Procedure Act*, *1976*, S.B.C. 1976, c. 25; section 2(1)2 of the Ontario *Judicial Review Procedure Act*, S.O. 1971, c. 48. See also sections 13 and 8 respectively of those statutes, giving the court a discretion to use the

simplified procedures even where an action for a declaration has been commenced. See also Rule 9.02 of the Nova Scotia Rules of Civil Procedure directing that certain types of proceedings shall be commenced by the simplified originating notice (application *inter partes*).

241. *Supra*, note 77 at 622.

242. See *e.g. Walker v. Gagnon*, [1976] 2 F.C. 155 (T.D.); *National Parole Board v. MacDonald*, [1976] 1 F.C. 532 (C.A.) *cf. Sherman v. Commissioner of Patents* (1974), 14 C.P.R. (2d) 177 (T.D.), *citing Prasad v. Minister of Manpower and Immigration*, unreported decision of Trial Division (Addy J.), 28 May 1974.

243. See *e.g. Medi-Data Inc. v. Attorney General of Canada*, *supra*, note 191 at 494-96 and *M.N.R. v. Creative Shoes Ltd.*, [1972] F.C. 93 (C.A.), *In re Anti-dumping Tribunal*, *supra*, note 229 at 1122-24.

244. See Lemieux and Vallières, *supra*, note 42 at 425.

245. *Supra*, note 229. Discussed by Lemieux and Vallières, *id.* See, also, the more recent decision of Smith D.J. in *In re Manhas and in re Immigration Act*, [1977] 1 F.C. 156 (T.D.). Here *certiorari* was sought seemingly without objection. However, the case was dismissed on the merits.

Evans, *supra*, note 113 at 137-40 also deals with this issue and cites other instances where *certiorari* has been sought but not awarded.

246. *Supra*, notes 229 and 242. The Trial Division had treated an application for a declaration as an application for *certiorari* because a declaration had to be commenced by way of action under Rule 603. This was inappropriate, according to the Court of Appeal. However, given that no objection was made they proceeded to consider whether a declaration should be granted, notwithstanding Rule 603.

247. See *e.g. Sherman v. Commissioner of Patents*, *supra*, note 242 at 181 (cited by Lemieux and Vallières, *supra*, note 42 at 424).

248. *R. v. Hillingdon London Borough Council, Ex Parte Royco Homes Ltd.*, [1974] Q.B. 720 (D.C.) at 728 (*per* Lord Widgery C.J.).

249. *Supra*, note 16a at 472.

> The reason I am stressing this point is that in argument, counsel for the appellant relied mainly on cases dealing with the duty of fairness lying upon all administrative agencies, in the context of various common law remedies. These are, in my view, completely irrelevant in the present case because a s. 28 application is an exception to s. 18 and leaves intact all the common law remedies in the cases in which it is without application.

This possibility is also adverted to by J. M. Evans, *supra*, note 113 at 133-41. It is also interesting to note that the unsuccessful applicant in *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board*, *supra*, note 132a has now applied to the Trial Division for *certiorari* and an application under Rule 474 for a preliminary determination of a question of law resulted in favour of the availability of relief. See *In re Martineau*, unreported decision of Federal Court, Trial Division (Mahoney J.), delivered July 14, 1977.

See also Fera's article, *supra*, note 113, particularly at 238 and 244-46, where for reasons that are not clear, he sees the *Millward* case, *supra*, note 113 as leaving some room for the availability of *certiorari* from the Trial Division. Commented on by Evans, *id.* at 140-41.

250. See *e.g. Martineau & Butters v. Matsqui Institution Inmate Disciplinary Board, supra,* note 132a at 88; *Royal American Shows, Inc. v. M.N.R., supra*, note 74 at 84.

251. See *e.g.* "*B*", *supra*, note 77; *Sherman v. Commissioner of Patents*, *supra*, note 242; *In re Nicholson*, *supra*, note 147; *McCann v. The Queen and Cernetic*, *supra*, note 147; *Kosobook v. Solicitor General of Canada*, *supra*, note 147; *Lambert v. The Queen*, *supra*, note 155.

252. See *e.g. Vapor Canada v. MacDonald (No. 2)*, [1971] F.C. 465 (T.D.); *Mitsui and Co. Ltd. v. Anti-dumping Tribunal of Canada*, [1972] F.C. 944 (T.D.) for early examples of prohibition being sought in the Trial Division without objection.

253. See Fera, *supra*, note 113 at 246-49, and Lemieux and Vallières, *supra*, note 42 at 425-27.

254. See *e.g.* "*B*", *supra*, note 77; *Kosobook v. Solicitor-General of Canada*, *supra*, note 147; *In re Nicholson*, *supra*, note 147; *Grauer Estate v. The Queen*, *supra*, note 78; *R. ex rel. Gilbey and Steffensen v. Gunn*, *supra*, note 78 (and, as these decisions exemplify, non-final decisions are not considered to be judicial or *quasi*-judicial in this context).

255. See *e.g. Maritime Telegraph & Telephone v. Canada Labour Relations Board*, *supra*, note 131; *In re Immigration Act*; and *In re Gray*, *supra*, note 131.

256. *Supra*, note 77.

257. *Supra*, notes 235 and 236 and accompanying text.

258. S. A. deSmith, *supra*, note 17 at 304 and 337.

259. *Id.*

260. *Supra*, note 125 and accompanying text.

261. *Supra*, note 15.

262. *Id.* at 723.

263. [1976] 2 F.C. 123 (C.A.). Note, however, *Russo v. Minister of Manpower and Immigration*, [1977] 1 F.C. 325 (T.D.), a case in which an injunction was sought to prevent execution of a deportation order (substituted at trial for an application for prohibition by consent) and where the court refused relief because, *inter alia*, the execution of orders was held not to be within the ambit of "a federal board, commission or other tribunal".

264. *Supra*, note 77.

265. The two authorities that Addy J. seemingly uses to support this proposition, whatever other restrictions they impose, do not seem to sustain this particular assertion. See *Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board*, [1952] 3 D.L.R. 162 (Ont. C.A.) and *Credit*

Foncier Franco-Canadien v. Board of Review, [1940] 1 D.L.R. 182 (Sask. K.B.). See also, Derril T. Warren, *The Declaratory Judgment: Reviewing Administrative Action* (1966), 44 Can. B. Rev. 610 at 626, where he states that in *certiorari* proceedings (and presumably prohibition) "the court is not concerned with judicial personality".

266. *Supra*, note 17 at 340.

267. *Id.*, note 22.

268. *Supra*, note 125 and accompanying text.

269. *Supra*, note 125.

270. *Id.*

271. *Id.*

272. Discussed by Fera, *supra*, note 113 at 250; Lemieux and Vallières, *supra*, note 42 at 433-34.

273. See *e.g.* "*B*", *supra*, note 77 at 621; *Rothmans of Pall Mall Canada Ltd. v. M.N.R.*, *supra*, note 187.

274. *Supra*, note 77.

275. *Supra*, note 237.

276. *Supra*, note 125 in the Trial Division at 214-15.

277. *Supra*, note 98 at 1175. (The court did however leave open the question of the possible affects of section 28(3) on the availability of *mandamus*.)

278. *Supra*, note 125 at 453.

279. *Supra*, note 99 at 30.

280. [1975] 1 S.C.R. 382.

281. See also, deSmith, *supra*, note 17 at 486.

282. Note that, in *Sherman v. Commission of Patents*, *supra*, note 242, it was argued unsuccessfully that, because Rule 400 stated that section 18 proceedings, other than those for a declaration or against the Attorney General, could be commenced by way of action or application, there was in fact no provision for declaratory proceedings and, by default, Ontario precedents governed. However, the court ruled, not surprisingly, that the Rule simply meant that the application procedure was excluded in those cases and that the normal action route governed.

283. Subject to possible restrictions suggested in "*B*", *supra*, note 77, discussed *infra*.

284. See *e.g. Walker v. Gagnon*, *supra*, note 242; *In re MacDonald*, (*National Parole Board v. MacDonald*), *supra*, notes 229 and 246; *Landreville v. The Queen*, *supra*, note 53.

285. Notably, "*B*", *supra*, note 77; *Sherman v. Commissioner of Patents*, *supra*, note 242; *Prasad v. Minister of Manpower and Immigration*, *supra*, note 242.

286. *Supra*, note 77.

287. *Supra*, note 235.

288. *Supra*, note 236.

289. *Hollinger Bus Lines v. Ontario Labour Relations Board*, *supra*, note 265, cited by Addy J. in "*B*" at 608, 09 and 14.

290. See Robert F. Reid, *Administrative Law and Practice* (Toronto: Butterworths, 1971) at 402.

291. *Hollinger Bus Lines* case, *supra*, note 265. See P. W. Hogg, *The Supreme Court of Canada and Administrative Law, 1949-71* (1973), 11 O.H.L.J. 187 at 195-96. See also, I. Zamir, *The Declaratory Judgment* (London: Stevens & Sons, 1962) at 96-101 and Derril T. Warren, *The Declaratory Judgment: Reviewing Administrative Action*, *supra*, note 265 at 625. Both these authors maintain that *certiorari* and declaratory relief are not or should not be mutually exclusive remedies. I also discuss this in *The Declaratory Judgment — Its Place as an Administrative Law Remedy in Nova Scotia* (1975), 2 Dal. L.J. 91 at 99.

292. *Hollinger Bus Lines*, *id.*; *Credit Foncier Canadien v. Board of Review*, *supra*, note 265, cited by Addy J. in "*B*", *supra*, note 77 at 614. See also, the more recent decisions of *Westlake v. The Queen in right of Ontario* (1971), 21 D.L.R. (3d) 129 (Ont. H.C.), *aff'd* (1972), 26 D.L.R. (3d) 273 (Ont. C.A.), *aff'd* [1971] S.C.R. vii and *MacLean v. Liquor Licence Board of Ontario* (1975), 9 O.R. (2d) 597 (D.C.), in the context of the availability of damages. (*MacLean* also involved declaratory and injunctive relief).

293. *Id.* at 614-16.

294. He cites *Driver Salesmen, Plant Warehousemen and Cannery Employees, Local Union No. 987 of Alberta v. Board of Industrial Relations* (1967), 61 W.W.R. 484 (Alta. S.C.) (an injunction case) and refers to "other similar cases". However, he describes this as a "narrow body of law" and goes on to disagree with *Samuels & Charter Airways Ltd. v. Attorney General for Canada and Air Transport Board* (1955), 1 D.L.R. (2d) 110 (Alta. S.C., A.D.) (the judgment of Johnson J.A. at 114). Note, however, the decision of the Federal Court of Appeal in *C.R.T.C. v. Teleprompter Cable Communications Corp.*, [1972] F.C. 1265 (C.A.) where the court refused on this very ground to strike out a statement of claim seeking a declaration. They held that a broad interpretation of section 18 was necessary and that the C.R.T.C. was clearly a federal board amenable to the declaratory judgment jurisdiction of the Trial Division. According to Thurlow J., delivering the judgment of the court:—

> In my opinion therefore, the appellant's objection is technical and without merit and should be rejected [at 1267].

See also, Derril T. Warren, *supra*, note 265 at 626-30, where he concludes that the entity need not be suable where the declaration is being used as a supervisory remedy.

295. *Id.* at 616-18.

296. *Supra*, note 42 at 427. See also Fera, *supra*, note 113 at 252-54.

297. *E.g. Lingley v. Hickman*, *supra*, note 45; *Grauer Estate v. The Queen*, *supra*, note 78; *Landreville v. The Queen*, *supra*, note 53; "*B*", *supra*, note 77.

298. *Lambert v. The Queen*, *supra*, note 155.

299. *Supra*, note 42 at 428-29.

300. *Supra*, note 77.

301. *Id.* at 615.

302. Discussed by Lemieux and Vallières, *supra*, note 42 at 430-32 and Fera, *supra*, note 113 at 253-54, with reference to *Cavanaugh v. Commissioner of Penitentiaries*, [1974] 1 F.C. 515 (T.D.) and *Johns v. Commissioner of Penitentiaries*, [1974] 1 F.C. 545 (T.D.), where Cattanach J., in *dicta*, held that declaratory relief was not available in such cases.

303. See *e.g. National Parole Board v. MacDonald*, *supra*, note 246; *Skitt v. Solicitor General of Canada*, [1976] 1 F.C. 556 (T.D.).

304. See *e.g. Auger v. Canadian Penitentiary Service*, *supra*, note 229. Note, however, that the Queen should not be the defendant in such cases as *mandamus* does not lie against the Crown.

305. *Supra*, note 42 at 431-32.

306. *Supra*, notes 77, 235 and 236.

307. Supra, note 237.

308. *Supra*, note 42 at 434.

309. "*B*", *supra*, note 237; *Rothmans of Pall Mall Canada Ltd. v. M.N.R.*, *supra*, note 187.

310. See *R. ex rel. Gilbey and Steffensen v. Gunn*, *supra*, note 78. Given that the allegation was bias, it was a strange remedy to seek anyway and presumably the principal relief sought was prohibition.

311. See, however, *Steve Dart Co. v. Board of Arbitration*, [1974] 2 F.C. 215 (T.D.) a case in which it was alleged in prohibition proceedings that the respondent had no authority to act because empowering regulations were *ultra vires*. Fera considers whether this was an appropriate case for prohibition and, by implication, the alternative possibility of *quo warranto*. After quoting deSmith, *supra,* note 17 at 342 to the effect that *certiorari* and prohibition are not appropriate with respect to persons who act without colour of legal authority or usurpers, he goes on to note considerable Canadian authority to the effect that *certiorari* and prohibition are available in cases such as *Steve Dart* (note 113 at 248-9). This incidently confirms the following unfootnoted statement by Nicholls, *supra*, note 10 at 256:

> The writ of *quo warranto*. . . is employed in those places where it still survives to challenge the appointment but not the validity of the law under which the appointment is made.

312. *Wardair Canada v. C.T.C.*, *supra*, note 130 at 602-03.

See also *Tsakiris v. Minister of Manpower and Immigration*, *supra*, note 130 at 226 (*per* Pratte J.):

> Prohibition lies to prevent an inferior tribunal exceeding its jurisdiction; it must not, therefore, be mistaken for an injunction or mere stay of proceedings.

313. *Penner v. Representation Commissioner for Canada*, *supra*, note 130 at 150.

314. See *Canada Labour Code*, R.S.C. 1970, c. L-1, as am. S.C. 1972, c. 18, s. 123.

315. See *Communications Workers of Canada v. Bell Canada*, [1976] 1 F.C. 282 (T.D.) and *Central Broadcasting Co. Ltd. v. Canada Labour Relations Board*, [1975] F.C. 310 (C.A.). Note also section 50(1) of the Act.

316. *Central Broadcasting*, *id*. Here the application for a stay was commenced in the Court of Appeal and was transferred to the Trial Division.

317. See Appendix No. 1 to this paper.

318. See section 30(1). See footnote 325, *infra*.

319. Authorized by section 30(2). See also footnote 326, *infra*.

320. See Rules 1107 and 1301.

321. *Supra*, note 42 at 411-16.

322. *Id*. at 411. See *Center for Public Interest Law v. C.T.C.*, *supra*, note 110. See also *Mills v. Minister of Manpower and Immigration*, [1974] 2 F.C. 654, (C.A.) criticized strongly by Henri Brun, *supra*, note 97 at 603.

323. See *e.g. Kalaam v. Minister of Manpower and Immigration* [1976] 1 F.C. 112 (C.A.), where section 28 cases were cited as authority on the point (*Benoit v. Public Service Commission*, *supra*, note 171 and *Lignos v. Minister of Manpower and Immigration*, *supra*, note 172).

324. See *e.g. Button v. Minister of Manpower and Immigration*, supra, note 202.

325. See section 30(1), section 21 (*Citizenship Act*), section 24 (*Income Tax Act*, *Estate Tax Act*). Note, in relation to section 24, it is provided that the Rules may provide for the Trial Divison *not* to have jurisdiction in such matters.

326. This has been done by Rule 704(9) (appeals under section 58 of the *Trade Marks Act*, R.S.C. 1970, c. T-10) and Rule 1015 (appeals under section 469(1) of the *Canada Shipping Act*, R.S.C. 1970, c. S-9).

327. I have, however, found no example of this.

328. P. Issalys and G. Watkins, *Unemployment Insurance Benefits: A Study of Administrative Procedure in the Unemployment Insurance Commission* (Ottawa: Supply and Services Canada, 1977) at 164-65.

329. See section 93(1), *Unemployment Insurance Act*, 1971, S. C. 1970-71-72, c. 48.

330. Viscount Radcliffe's review of L. Blom-Cooper and G. Drewry, *Final Appeal — A Study of the House of Lords in its Judicial Capacity* (Oxford: Clarendon Press, 1972) is a very salutory warning to those who approach the task of assessing a court's performance in the field of public law. See (1973), 36 Mod. L. Rev. 559 at 564-65.

331. Seven as of 1976.

332. Except, of course, in certain interlocutory matters.

333. Eleven as of 1976 (counting the Chief Justice and the Associate Chief Justice) plus various deputy judges as designated under section 10(1).

334. *Supra*, note 3 at 28-29.

335. See *e.g. Secretary of State for Education and Science v. Tameside Metropolitan Borough Council*, [1976] 3 W.L.R. 641 (C.A. and H.L.); *Congreve v. Home Office*, [1976] 2 W.L.R. 291 (C.A.); *Laker Airways Ltd. v. Department of Trade*, [1977] 2 W.L.R. 234 (C.A.) and, of course, the most recent and controversial, *Gouriet v. Union of Post Office Workers*, [977] 2 W.L.R. 310 (C.A.).

336. See *e.g. Rowling v. Takaro Properties*, [1975] 2 N.Z.L.R. 62 (C.A.); *Fitzgerald v. Muldoon*, [1976] 2 N.Z.L.R. 615 (S.C.).

337. See *e.g. Moore v. Minister of Manpower and Immigration* [1968], S.C.R. 839 (particularly the judgment of Judson J.). See, however, *Doctors Hospital v. Minister of Health*, *supra*, note 175 and *Re Multi-Malls Inc. and Minister of Transportation and Communications* (1976) 73 D.L.R. (3d) 18 (Ont. C.A.).

Lemieux et Vallières make the following conclusion on the Trial Division's original jurisdiction in judicial review matters (*supra*, note 42 at 434):—

> Un relevé des décisions rendues par la Cour nous permet d'affirmer que le volume du contentieux de la légalité est beaucoup moins important en Division de première instance qu'en Cour d'appel.

338. See *Lazarov v. Secretary of State of Canada*, *supra*, note 139; *Blais v. Basford*, *supra*, note 139 and *Blais v. Andras*, [1973] F.C. 182 (C.A.). Discussed *infra*.

339. *Supra*, note 3 at 36-43.

340. It was withdrawn as an allegation in *In re Anti-dumping Act* and *In re Y.K.K. Zipper Co. of Canada Ltd.*, [1975] F.C. 68 (C.A.) and has been considered as a ground for review and rejected in *Hunt v. Public Service Appeal Board*, [1973] F.C. 561 (C.A.) at 564; *Commonwealth of Puerto Rico v. Hernandez*, *supra*, note 200 at 1207-08; *Armstrong v. State of Wisconsin*, [1973] F.C. 437 (C.A.) at 458-59 (perhaps); *Alemao v. Minister of Manpower and Immigration* (1975), 12 N.R. 184 (F.C.A.).

341. See *In re Harris*, [1976] 1 F.C. 84 (C.A.) at 96 and *Moffatt Broadcasting Ltd. v. Attorney General of Canada*, [1973] F.C. 516 (C.A.). See also *In re Morrison* [1974] 2 F.C. 115 (C.A.) where the argument was rejected.

342. No evidence, of course, may be seen not as speaking to factual error at all but rather to fact/law application and leading to the implication that,

on the facts as found, no tribunal properly instructed in the law could have reached the conclusion which the decision-maker did. See, the classic statement of Lord Radcliffe in *Edwards v. Bairstow*, [1956] A.C. 14 (H.L.) at 36.

343. *Supra*, note 202. See also accompanying text.

344. *Id.* at 463.

345. This is perhaps supported by the fact that the word "due", which appeared in the Bill before "regard", was omitted from the Act when it was reported back to the House by the Standing Committee on Justice and Legal Affairs. See the U.T.L.J. article for a discussion of this. *Supra*, note 3 at 42, n. 91.

346. See *e.g. Thomas v. Attorney General of Canada*, [1972] F.C. 208 at 220-21 (C.A.) at 488.

347. This was the thrust of comments by Gordon F. Henderson, Q.C. on my paper delivered at the Osgoode Hall Law School at York University on Friday, February 18, 1977 (to be published in Conference Proceedings).

348. *Committee for Justice and Liberty v. National Energy Board*, *supra*, note 216 and *P.P.G. Industries Canada Ltd. v. Attorney General of Canada*, [1976] 2 S.C.R. 739 *reversing* [1973] F.C. 745 (C.A.) and *restoring* [1972] F.C. 1078 (T.D.) (*sub nom. In re Anti-dumping Tribunal and re Transparent Sheet Glass*).

349. *P. P.G. Industries Canada Ltd., id.*

350. *Committee for Justice and Liberty v. National Energy Board*, *supra*, note 216.

351. *Supra*, note 157.

352. *Id.* at 228-29.

353. See *e.g. Furnell v. Whangarei High Schools Board*, [1973] A.C. 660 (P.C.) (N.Z.).

354. See *e.g. Kedward v. The Queen*, *supra*, note 139; *Gateway Packers 1968 Ltd. v. Burlington Northern (Manitoba) Ltd.*, [1971] F.C. 359 (C.A.).

355. *Supra*, note 139.

356. *Supra*, note 338.

357. *Supra*, note 139.

358. *Dowhopoluk v. Martin* (1971), 23 D.L.R. (3d) 42 (Ont. H.C.).

359. *Supra*, notes 148-49 and accompanying text.

360. *Supra*, note 149.

361. Of course, it should be noted that the Supreme Court of Canada was affirming a Court of Appeal decision in *Prata*, *supra*, note 149, so presumably that court saw a difference between the two statutory contexts.

362. [1972] F.C. 1239 (C.A.). Discussed by H. N. Janisch, *Fairness:*

Confidentiality and Staff Studies in Current Issues in Administrative Law (ed. H. N. Janisch) (Halifax; Dalhousie Faculty of Law, 1975) 14.

363. See *Lazarov*, *supra*, note 139 at 940-41.

364. *Supra*, note 362 at 1246-48.

365. See Janisch, *supra*, note 362 at 14-16.

366. See R. A. Macdonald, "*Delanoy v. Public Service Commission Appeal Board*" (1977), 3 Dal. L.J. 849. (*Delanoy* is reported at [1977] 1 F.C. 562 (C.A.).) This point was also made by Professeur Patrice Garant of Laval in commentary on my paper, *supra*, note 347.

367. See *MacDonald v. Appeal Board Established by Public Service Commission*, [1973] F.C. 1081. (C.A.); *Charest v. Attorney General of Canada*, [1973] F.C. 1217 (C.A.); *Brooker v. Attorney General of Canada*, [1973] F.C. 327. (C.A.); *In re McKendry*, *supra*, note 97; *cf. Nanda v. Appeal Board Established by Public Service Commission*, *supra*, note 212, where the breaches of the *audi alteram partem* rule involved a failure to hear witnesses and having to put forward case and arguments before hearing the Department's reasons.

368. See *e.g. Charest*, *id.* at 1220 and *McKendry*, *supra*, note 97 at 130-31.

369. *Brooker*, *supra*, note 367.

370. *Re MacDonald*, *supra*, note 367.

371. [1976] 1 F.C. 615 at 617 (*per* Thurlow J.) and 623 (*per* Pratte J.).

372. [1976] 2 F.C. 369 (C.A.).

373. *Id.* at 379-81.

374. *Id.* at 381.

375. [1976] 2 F.C. 621. Discussed by G. V. La Forest, Q.C. and Gaylord Watkins in *The Impact of Federal Administrative Tribunals of Recent Developments in Administrative Law*, an unpublished paper, delivered June 1976.

376. *Id.* at 623-25.

377. *Id.* at 623.

378. Suffice it to say that the Federal Court of Appeal has been very conservative in its use of sections 1(*a*) and 2(*c*) of the *Canadian Bill of Rights* as a basis for implying procedural requirements into statutory decision-making. See *e.g. Armstrong v. State of Wisconsin*, [1972] F.C. 1228 (C.A.); *National Capital Commission v. Lapointe*, [1972] F.C. 568 (T.D.).

379. See Appendix No. 2.

380. In the sense that its impact will be to cast procedural burdens on certain statutory decision-makers exercising purely administrative functions, the area of the Trial Division's competence by virtue of sections 18 and 28.

(Note, however, the very recent decision of *In re Martineau*, *supra*, note 249).

381. *Supra*, note 42 at 396 and 398.

382. See Appendix No. 2.

383. See section 2 of the *Judicature Amendment Act (No. 4)*, S.O. 1970, c. 97, inserting section 5(*a*) into the *Judicature Act*, R.S.O. 1970, c. 228. ("As may be designated by [the Chief Justice] from time to time").

384. See sections 25(2) and 26(2) and (3) of the Judicature Act 1908 (N.Z.), as amended by the Judicature Amendment Act 1968.

385. *Supra*, note 46 at 261 (English version) and 105 (French version). In this context, the question of whether the *Federal Court Act* should continue to exclude the operation of privative clauses (*supra*, note 16a) should be considered. In so far as they mark a specific legislative attempt to define the scope of judicial review for particular authorities, there is arguably no room at all for the re-enactment of the opening words of section 28(1) ("Notwithstanding the provisions of. . . any other Act") in any reformulation of the Federal Court's review powers.

386. Noted in my *Federal Court Act* article, *supra*, note 3 at 27-28 and 32-33.

387. A three man Divisional Court as a result of the *Judicial Review Procedure Act*, S.O. 1971, c. 48.

388. *Report of Commonwealth Administrative Review Committee* (Parliamentary Review Paper No. 144, 1971) ("Kerr Committee Report"). (Canberra: Commonwealth Printing Office, 1971) at 76-80. For comments on this Report see Jacob I. Fajenbaum, *The Commonwealth Administrative Review Committee and Judicial Review* (1973), 47 Aust. L.J. 353 (critical) and Harry Whitmore, *Administrative Law in the Commonwealth: Some Proposals for Reform* (1972), 5 Fed. L. Rev. 7 (approving).

389. *Report of Committee of Review — Prerogative Writ Procedures* (Parliamentary Paper No. 56, 1973). (Canberra: Government Printer of Australia, 1973) (*Ellicott Committee Report*).

390. See *Report on Remedies in Administrative Law* (Law Commission No. 73) (London: H.M.S.O. 1976), Cmnd. 6407 at 19-21 and section 1 (1) of the Commission's Draft Bill, Appendix A at 30-31.

391. Section 2(1), *Judicial Review Procedure Act*, S.O. 1971, c. 48.

392. Section 2(1), *Judicial Review Procedure Act*, S.B.C. 1976, c. 25.

393. Section 4(1), Judicature Amendment Act 1972 (N.Z.).

394. *Supra*, note 388, at 77 (para. 258). See also the Ellicott Committee Report, *supra*, note 389 at 9-10 (paras 39-43).

395. *Id.*

396. See Kerr again. *Id.* at 78 (para. 213).

397. The difficulties involved in this terminology have been discussed in four articles and comments:— *Reform of Judicial Review of Administrative Action—The Ontario Way* (1974), 12 O.H.L.J. 125 at 141-45 and 148-50; *Confusion Perpetuated: The Judicial Review Procedure Act Before the Divisional Court* (1974), 22 Chitty's Law Journal 297 at 297-99; *Judicial*

Review of Administrative Action, [1975] N.Z.L.J. 154 at 149-50; *Reform of Administrative Law Remedies—Method or Madness?* (1975), 6 Fed. L. Rev. 340 at 351-56. Interestingly, while the term "statutory power of decision" is not an express qualification on the general availability of review in the nature of *mandamus*, prohibition or *certiorari* under the Ontario Act (see section 2(1)2 of the Ontario Act and section 2(2)(*a*) of the B.C. statute in comparison with section 4(1) of the New Zealand Act), the Ontario High Court has on at least two occasions read the qualification in when such relief was sought. See *Re Robertson and Niagara South Board of Education*, (1973) 1 O.R. (2d) 548 (D.C.) and *Re Maurice Rollins Construction Ltd. and Township of South Fredericksburgh* (1975), 11 O.R. (2d) 418 (H.C.). (See J. M. Evans, *Judicial Review in Ontario—Some Problems of Pouring Old Wine into New Bottles* (1977), 55 Can. B. Rev. 148 at 151-59.

Note, however that the Law Commission's Draft Bill avoids this terminology completely. *Supra*, note 390.

398. See *e.g. Thames Jockey Club v. New Zealand Racing Authority*, [1974] 2 N.Z.L.R. 609 (S.C.), *aff'd* [1975] 2 N.Z.L.R. 768 (C.A.) and *Re Florence Nightingale Home and Scarborough Planning Board*, [1973] 1 O.R. 615 (D.C.).

399. Section 3 (error of law). Nothing in B.C. Act on factual error.

400. Section 2(2) (error of law) and (3) (error of fact). Note, there is no equivalent to this in the proposed English statute.

401. See section 7 (B.C. Act) and section 2(4) (Ontario Act). Note that this may not surmount the difficulties of knowing the bodies for which declaratory relief is appropriate but at least it circumvents any arguments about the availability of *certiorari*-type relief in relation to bodies that *are* amenable to declaratory relief. See also the proposed section 2 of the proposed English Bill. *Supra*, note 390 at 34-5 (discussed 25).

402. *Id.* Section 3(1) also.

403. Section 4 (section 8 in New Zealand Act).

404. Section 10.

405. See Rule 9.02 of the Nova Scotia Rules of Civil Procedure for an example of an interesting attempt to draft a rule providing for cases where the simpler application procedure should be used. This is based on section 3(1) of the Fourth Schedule to the New South Wales Supreme Court Act, 1970. In this context, it is also suggested that the limitation period, with respect to any proceedings that have as their target the setting aside of a decision or order, whether by way of relief in the nature of *certiorari*, *mandamus* or declaration, should be set at one month from the date of the communication of the decision or order (with the possibility of extensions with leave). Given the difficulties involved in deciding to launch and then launching an application of this kind, the present ten day period seems too short, though the normal six month limitation on the availability of *certiorari* is seen as leaving things up in the air for far too long. *cf.* The English Law Commission's position, *supra*, note 390 at 22-23.

406. *Supra*, note 175.

407. *Supra*, note 175. This accords with the Law Commission's recommendations. *Supra*, note 390 at 21-2. See section 1(3) of the draft Bill (at 31-32) where the court is not to grant relief "unless it considers the applicant ... has a sufficient interest in the matter to which the application relates".

408. *Supra*, note 15.

409. Professor Evans was the third commentator on the paper I delivered at the Osgoode Hall Law School, *supra*, note 347. See also *The Trial Division of the Federal Court: An Addendum*, *supra*, note 113 at 132-33.

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